THE CONVEYANCER
AND
PROPERTY LAWYER

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CONVEYANCER'S NOTEBOOK

Agriculture Act, 1947.—In our last number we pointed out that section 86 had been brought into force and that this section was most important in that agricultural land could not be sold without permission of the Minister save as complete agricultural units. The position was by no means clear, because the section referred to an order by the Minister. In the January number of the Law Society's *Gazette* it is announced that the Council took this matter up with the Minister and have now obtained an assurance that "until the Minister makes an order under section 86 it will not be treated as being in force either generally or in relation to any particular area and, furthermore, that the section will not be brought into force from a date before the making of such an order". The *Gazette* adds that "it must be admitted that the theoretical position is far from plain".

This temporarily disposes of the matter in one sense. It is valid to have a sale of part of an agricultural unit. Nevertheless it also seems plain that it is wise to ascertain what the position is, that is to say, how far the land conveyed contains one or more agricultural units. It is also most important to ensure that no order has been made before the sale. It could be wished that the Ministry had also given an assurance that no such order would be made without the local Land Registrar of the district concerned being first notified, so that solicitors have only to inquire of the local land registry to be sure that no order has been made.

In the circumstances it is desirable to ask as a preliminary inquiry whether or not any order has been made.

Most of the Act has now been brought into operation as from March 1 by the order 342/1948. This is dealt with later in this issue.

Burmese citizens.—The independence of Burma has presented some pretty problems in British citizenship. These are dealt with in some detail in the Burma Independence Act, 1947, s. 2 and Schedule I. To set out the details would perhaps not be justified in this journal since the question is not likely to come before many of our subscribers. In

a general way it may be said that any persons who, or whose father or paternal grandfather, was born in Burma will cease to be British citizens save where he or his father or paternal grandfather was born outside Burma and within His Majesty's Dominions or a protectorate or mandated territory. Furthermore, a woman, whose husband remains a British subject, does not cease to be a British subject. It is also provided that where a person is immediately before the day of independence domiciled or ordinarily resident within His Majesty's dominions (except the Dominions), or any protected State or mandated territory, he may elect within two years to remain a British subject. This requires a declaration to be registered in the manner prescribed by regulation.

Exchange Control Act.—The Exchange Control Act, 1947, may affect trustees and others dealing with assets, though it is primarily no doubt intended for the business community. The essential operative words are " Except with the permission of the Treasury ". When in doubt, therefore, application should be made to the Treasury. The Act is designed to prevent unauthorised transfer of assets outside the " scheduled territories ". The " scheduled territories " include the Commonwealth (except Canada and Newfoundland), mandates, protectorates, Egypt, Anglo-Egyptian Sudan, Iraq, Transjordan, Iceland and the Faroe Islands. The Act prevents transactions with gold or foreign currency. Part I includes traveller's cheques and letters of credit. It also prevents payments to or for the credit of persons resident outside the scheduled territories, and this whether the payment is made inside or outside the United Kingdom. Part II. This Part II is obviously of interest to trustees or personal representatives where one or more of the beneficiaries happen to be resident outside the scheduled territories. It actually includes provision (section 5 (c)) that no sum shall be placed to the credit of any person resident outside the scheduled territories. Where a beneficiary is resident abroad it is difficult to see how the trustees can avoid making some credit entry in the trust accounts, but it seems clear that they must communicate with the Treasury. Emphasis on this position of trustees is given by section 29 (Part V) which prohibits any settlement (otherwise than by will) or the exercise of any power of appointment (otherwise than by will) so as to confer any interest on any person resident outside the scheduled territories. Such a settlement or appointment is void only to the extent of the interest of the person resident outside the scheduled territories (section 29 (2)). The settlement can be validated *ex post facto* by Treasury certificate (section 29 (3) incorporating section 18 (2)). A person is deemed to take an interest whether it is present or future, vested or contingent, and even where he is a member of a class. The last point is obviously open to difficulty in drawing powers of appointment in post nuptial settlements. It will be borne in mind that wills are exempt from these provisions.

Another provision may be remarked upon though of less immediate concern, namely, that there is a duty to enforce payment of liabilities from countries outside the scheduled territories (section 24). This section is obviously designed to prevent practical evasion of the Act

by agreements with persons outside the scheduled territories. There is a similar provision concerning the importation of goods (section 25).

There is also Part III, which is concerned with securities, that is stocks and shares and debentures and similar securities. These provisions are more complicated, but have the same effective purpose of preventing persons outside the scheduled territories acquiring these securities by themselves or their nominees without the permission of the Treasury or conversely that a transferor or nominee shall not be resident outside the scheduled territories.

This brief account of the general features of the Act is intended only as a warning and not as a complete account of the relevant provisions because it is felt that they are not of sufficient general importance to conveyancing. Their nature is, we hope, quite clear from what has been said and steps should be taken wherever a transaction involving residents outside the scheduled territories are concerned.

Settled Land, etc., Act, 1943.—The operation of this Act (noted Vol. 8, p. 2), has been extended till December 10, 1950. The Act was primarily designed to enlarge the powers of the Court (under Settled Land Act, s. 64, and Trustee Act, s. 57) to direct the employment of capital money for purposes not authorised by the Act. The Act also (and apparently permanently) enlarged section 64 to include " improvements ". Actually the extension of this Act may be of some importance in connection with the Agriculture Act. That Act is designed, among other things, to see that the " fixed equipment " and other state of the property is really adequate to modern economic farming. It may be that expenditure of capital money may be desirable or necessary for this purpose and it may also be that some of the expenditure could only be authorised under this extended section 64 by reference to the " management " of the estate. The more drastic provisions of the Agriculture Act relating to " good estate management " have not yet come into operation but it may be desirable to look into these matters and the financing of them while there is still time.

A contributor has supplied the following problem :—

Blackacre is vested in A and B " as joint tenants to hold in trust for themselves as tenants in common ". A dies. Despite an assent by the representative of A to C is the legal estate vested in B alone and must he appoint another trustee (say A's devisee) to be a trustee in place of A in order to make the title good.

The effect of this grant depends upon the construction to be put upon section 34 of the Law of Property Act, 1925. Section 36 of the same Act cannot apply because the joint tenancy is not held beneficially.

Section 34 applies where land is *expressed* to be conveyed " to any persons in undivided shares ". Now this conveyance is not so expressed because the legal estate is conveyed to persons as joint tenants and they are only expressed to hold it on trust for persons in undivided

shares—in this respect the language differs from section 36. Having regard to the difference in wording and the precise terms of section 34 we think that on a strict construction of the section there is no statutory trust for sale. In these circumstances the legal estate survives to B (A and B cannot hold a legal estate in undivided shares) who could make a good title with the concurrence of the beneficiaries. The concurrence is necessary because there is no power of sale, but this construction is difficult to reconcile with Settled Land Act, s. 36 (4), which provides that there must be a trust for sale if there are undivided shares not held under a trust instrument, which applies to settled land (section 117 (xxiv)).

On the other hand the Act seems, in fact, to have been construed in favour of the creation of the statutory trust for sale. In this case the legal estate survives to B as statutory trustee for sale and he cannot force the title on a purchaser without appointing a new trustee : Law of Property Act, s. 42 (1). He can appoint the new trustee in the deed of conveyance to the purchaser : see Precedent 27, 11 Conv. (N.S.) p. 379. Nevertheless, as the position is uncertain C should be joined in the conveyance and his equitable title recited in case B is a sole surviving trustee without a power of sale. In our view and in the absence of authority we think that the only safe course is to provide for the alternative possibilities.

Another contributor has supplied another problem on undivided shares :—

A died in 1911, having by her will dated 1904 devised freehold property to B and C " in equal shares and proportions as tenants in common ".

Probate of the will was granted to D and E, the executors named therein, in 1911.

By an assent under hand dated April 2, 1932, the executors (D and E) vested the property in B and C " for an estate in fee simple as tenants in common in equal shares ".

By a mortgage dated April 13, 1932, which recited the above particulars and also that under the First Schedule to the Law of Property Act, 1925, the property was then " vested in B and C in fee simple upon the statutory trusts for sale and upon trust as to the net proceeds of sale thereof and the net rents and profits until sale for the same persons in equal shares as tenants in common " C in consideration of an advance from B assigned unto B " his one-half share of the net proceeds of sale and the net rents and profits till sale of the property and all other his equitable interest under the statutory trusts affecting the said property " to hold the same unto B subject to the proviso for redemption therein contained.

B died in 1937 intestate and letters of administration to her estate were granted to F (her husband).

By an assent dated January 19, 1938, F assented to the vesting in himself absolutely " of a moiety of the proceeds of sale and of the net rents and profits until sale " of the said property and also of the benefit of the mortgage.

C died in 1947 intestate and letters of administration to his estate were granted to G (his wife).

G wishes to discharge the mortgage and to have C's interest in the property vested in her.

On B's death the legal estate vested in C as sole surviving trustee for sale, but the moiety beneficially and the mortgage of the other moiety vested in F. On C's death the legal estate vested in C who, under the Trustee Act, s. 18, has the powers of the deceased trustee; this includes the power of appointing a new trustee or trustees. In order, therefore, to discharge the mortgage now vested in F it is necessary only to deal with the equitable interest which is an interest in the proceeds of sale, that is, of personalty: see *Re Kempthorne*, [1930] 1 Ch. 268 (a precedent will be found in 2 K. & E. p. 280). The effect of this discharging the mortgage will leave G trustee for sale, for G and F as tenants in common in equal shares of the proceeds of sale, but G will hold the moiety as personal representative of C. No written assent would be necessary so far as this share is concerned since it is personalty and in any event does not affect the legal estate: Administration of Estates Act, s. 36 (4) and equally endorsement on the grant is not essential.

We have received the following letter from Mr. Bertram Plummer of Leicester:—

"Referring to the article by Mr. J. F. Garner on 'Statutory Charges on Land', in the September issue of *The Conveyancer*, it is to be noted that by section 3 (3) of the Rent Restrictions (Notices of Increase) Act, 1923, 'where a tenant has obtained from the sanitary authority a certificate that the house is not in a reasonable state of repair and has served a copy of the certificate upon the landlord, it shall be a good defence to any claim against the tenant' for an increase of rent under that Act.

"The fact of the certificate being in existence is not registered as a local land charge and can best be ascertained by inquiry of the local authority. It would seem desirable to ask this as one of the specific inquiries made of the local authority prior to the contract being signed in the case of a purchase or an advance being made in the case of a mortgage.

"It will be noted that section 3 (3) is not operative until the tenant has served a copy of the certificate upon the landlord. It is customary to ask in the preliminary inquiries on a draft contract whether any notices affecting the property have been served by a local authority or any other person, and this inquiry would cover the point I have raised. It is to be borne in mind that the notice would appear to remain operative without limit of time, for section 3 (3) provides that in any proceedings against the tenant for increase of rent or recovery of possession on the ground of non-payment of such increase, 'the production of the said certificate shall be sufficient evidence that the house was and continues to be in the condition therein mentioned, unless the contrary is proved'.

"The power of the tenant in such circumstances to withhold the payment of rent does not, of course, arise where section 3 of the 1939 Act applies, since there is no increase of rent charged.

"An interesting point arises where, as not infrequently happens, a contract is signed without preliminary inquiry regarding notices.

"It would seem that the purchaser cannot require compensation from the mere fact that such a notice was in existence at the time the contract was entered into, unless, as is extremely probable, the vendor stated that the rent was xs. –d. per week, including in it the validated increase of rent under the Rent Restrictions (Notices of Increase) Act, 1923, in which case the question of misrepresentation would arise."

Mr. Garner replies as follows :—

"I completely agree with my correspondent's remarks, which provide another reason for making full inquiries before contract. However, I think if the intending purchaser's advisers make all the inquiries detailed in the final section of my article under reference (especially the inquiry of the district or county borough council as to outstanding notices), and in view of the common practice to include in the 'usual preliminary inquiries' an inquiry as to outstanding notices served by a local or other public body, that the purchaser would be informed if any such certificate were in fact in existence. I agree that the notice would remain effective without limitation of time, but presumably when the repairs had been carried out to the satisfaction of the sanitary authority, the landlord would be able to require the authority to cancel the certificate."

Statutory Conveyances.—The Minister of Fuel and Power has now made Regulations (*a*) under sections 14 and 15 and other provisions of the Electricity Act, 1947 (*b*), regulating the vesting of assets of local authority and company undertakings in the Electricity Boards set up under the Act. Practitioners concerned with this specialist subject will consult the Regulations in detail—it is sufficient here to note the points of more general interest that arise.

Part I of the Regulations purports to provide for the "Registration of title of Electricity Boards", Art. 1 (1) providing for the due registration of the title of the Board to all "assets" vesting in them. It seems, however, that registration is not here to be construed in the customary conveyancing sense of the Land Registration Act, 1925, for the duty of so registering a particular Board's assets is imposed only upon a "body and person any of whose assets vest in an Electricity Board by virtue of the Act".

Article 2 of these Regulations provides that disputes as to property held or used by a local authority partly in their capacity as authorised undertakers and partly in other capacities may be referred for determination to the Minister of Health. Easements which a particular Board ("in whom land of any local authority is vested") are of opinion are required to enable the land which is so vested to be used for the purposes of the Board (Art. 5 of the Regulations), will vest in the Board, subject to a notice in the form set out in the Schedule to the Regulations being duly served, and subject also to an

(*a*) The Electricity (Vesting of Assets) Regulations, 1948, SI, 1948, No. 239, which came into force on February 23, 1948.

(*b*) See article in the December, 1947 issue of this Journal, entitled "Statutory Conveyances", especially at p. 101.

appeal to the Minister of Health (if necessary) to determine the "question" (section 15 of the Act).

Similar provisions are to apply to the vesting of the assets of the company undertakings, with the exception that here "questions" are to be determined, not by the Minister of Health, but by arbitration.

Under section 18 of the Act, any agreement or lease, etc., made by an undertaking after November 19, 1945, whose assets have vested in a Board by virtue of the Act, may be disclaimed by the Board, for certain specified reasons. Notice of disclaimer must be given within three months of vesting date, and under Article 13 of the Regulations, a person to whom such notice has been given (being a party to the agreement or lease) may submit the matter to arbitration, within a month from the date of service upon him of the notice.

J. F. G.

Agriculture Act, 1947.—The following press notice has been received :—

An Order in Council has been made bringing into operation the following parts of the Act as from March 1, 1948 :—

Parts II and III (*Sections* 9–46) *together with the Second, Third, Fourth, Fifth, Sixth and Seventh Schedules*
dealing with good estate management and good husbandry, and the relationship of landlords and tenants of agricultural holdings.

Section 95—dealing with special directions to secure production.

Section 101—dealing with the provision of equipment and services for pest control.

Section 110—repealing certain of the enactments set out in the Thirteenth Schedule.

Part II of the Act includes provisions dealing with rules of good estate management and good husbandry, the making of supervision orders, directions to secure good estate management and good husbandry, and dispossession of owners or occupiers on the grounds of bad estate management or bad husbandry. Part III of the Act, which is to be construed as one with the Agricultural Holdings Act, 1923, includes provisions dealing with compensation to tenants for improvements and tenant right and to landlords for deterioration, compensation for disturbance and control of notices to quit, and the variation and ascertainment of terms of contracts of tenancy. The position of owners and occupiers under these provisions is set out in an explanatory booklet prepared by the Ministry entitled *Rights and Obligations of Landlords, Tenants and Owner-Occupiers of Agricultural Land*, copies of which may be purchased from His Majesty's Stationery Office or through any bookseller, price 9d.

With one or two exceptions, such as the appointment of arbitrators, the Minister has delegated his functions under Parts II and III of the Act to the County Agricultural Executive Committees. Any applications for the Minister's consent or approval should, therefore, be made to the Secretary of the Agricultural Executive Committee for the county in which the land is situated. The above-mentioned booklet indicates those few matters on which application should be made to

the Ministry of Agriculture in London instead of to the County Agricultural Executive Committee.

We are printing a short note by Mr. J. Muir Watt on the general effect of these Orders, particularly on agricultural holdings and hope in the following issue to publish a completely revised draft or drafts of agricultural tenancies. We also publish separately a short note indicating generally the effect of the delegation of the Minister's powers to the County Agricultural Executive Committees, Apart from these it may be convenient to mention the Agriculture (Control of Notices to Quit) Regulations, 190/1948, which includes a form of application for consent to the operation of a notice to quit. The application is made to the County Committee. The Regulation also provides for counter notice by the tenant requiring the matter to be submitted to arbitration on the grounds contained in Regulation 5, which may be briefly summarised as (i) failure to comply with a notice to pay rent or remedy breach of covenant; (ii) the interest of the landlord had been materially prejudiced by an irremediable breach of covenant; or (iii) land required for use otherwise than agriculture.

There is also the Agriculture (Maintenance Repair and Insurance of Fixed Equipment) Regulations, 184/1948. These contain necessary provisions in a tenancy agreement. They are automatically imposed in any agreement whether *before* or after the Act, except so far as the agreement imposes the liability on the other party to the agreement that is implied by the Act. The details would occupy much space but they must be consulted in any dispute. The Agriculture (Calculation of Value for Compensation) Regulations, 185/1948 as their name implies deal with the problems of compensation between landlord and tenant, and must again be consulted in detail.

We should also call attention to the Agriculture (Miscellaneous (Time-limits) Regulation, 188/1948, where various time limits for notices under Parts II and III are set out. The Regulation is by reference and to set out what it does would take more space than can be devoted at such short notice, since we were in the process of going to press when these Orders came to hand. The Regulation should be read in conjunction with the Agriculture (Making of Representations) Regulation, 191/1948, by which a time limit of ten days after notice is given for making representations in writing. We think the time too short.

The Agriculture Orders (Revocation) Order, 1948, revokes certain Orders made under the Defence Regulations and Supplies and Services Acts.

Town and Country Planning Act.—Another correspondent writes: In your footnote (*b*) to Form 9 on page 337 of the December issue of *The Conveyancer*, you say "To turn a single dwelling-house into flats is 'development' apparently carrying a development charge".

With respect, is not the point covered by section 69 (2) of the Act, which exempts from liability to development charge the operations

specified in the Third Schedule to the Act. Paragraph 2 of Part I of that Schedule reads as follows :—

> " The use as two or more separate dwelling-houses of any building which on the appointed day was used as a single dwelling-house ".

Our learned correspondent has misunderstood the point of the footnote. This was to draw attention to the words " single private ". It was not anticipated that immediate conversion *prior to* the " appointed day " would be contemplated. The difficulty is that the Act does not seem to define a dwelling-house and we do not think the topic so free from ambiguity that it does not require careful consideration. Another point is that there may on the appointed day be many houses suitable for conversion but not converted. What of them? We do not know.

CORRIGENDA AND NOTANDA

Subscribers are requested to note the following corrections and notes to precedents previously published.

Form 12, p. 342 (*issue dated December, 1947*).

Add to editorial note (*a*).

The precedent may be used where the annual sum is payable to a child, but no payment should become due before April 5, following the child's majority or earlier marriage. The precedent should not be used if the annuitant or his parent is in the service of the covenantor, or is accustomed to act as his solicitor or agent, if it is desired to avoid surtax.

Form 11, Vol. 11, p. 346.

Editorial note (*a*).

The stamp should be *ad valorem.* See Lands Clauses Consolidation Act, 1945, s. 77.

THE AGRICULTURE ACT, 1947

By J. MUIR WATT, M.A., Barrister-at-Law

The Minister of Agriculture and Fisheries has made an Order in Council (SI No. 342/1948) bringing into operation *inter alia* Parts II and III of the Agriculture Act, 1947, together with the Second, Third, Fourth, Fifth, Sixth and Seventh Schedules, as from March 1, 1948. Part III of the Act, it will be remembered, is to be construed as one with the portions of the Agricultural Holdings Act, 1923, which remain unrepealed. The new code governing agricultural holdings is, therefore, now in force. Further, among a number of sets of regulations issued by the Minister under powers conferred upon him by the 1947 Act are two of paramount importance to the draftsmen of agricultural tenancy agreements—the Agriculture (Maintenance, Repair and Insurance of Fixed Equipment) Regulations, 1948, (SI No. 184/1948) and the Agriculture (Calculation of Value for Compensation) Regulations, 1948 (SI No. 185/1948). Both sets come into operation on March 1, 1948.

It is hoped to publish in the next issue of *The Conveyancer* a full precedent of an agricultural tenancy agreement, framed in the light of the Agriculture Act, 1947. In the meantime it may be useful to direct attention to the very important bearing of the two sets of regulations above mentioned on the form and content of tenancy agreements.

The Agriculture (Maintenance, Repair and Insurance of Fixed Equipment) Regulations, 1948, prescribe the statutory repair clauses under section 37 of the Act. It must now be emphasised that these statutory clauses are to be read into all tenancy agreements, *existing and future* "except in so far as they would impose on one of the parties to an agreement in writing a liability which under the agreement is imposed on the other". It is essential for those who advise landlords and tenants to procure a copy of the regulations immediately and study them together with existing tenancy agreements in order to see how far the statutory clauses are incorporated. It is also essential for those about to draft new agreements to consider how far the statutory clauses meet the circumstances and how far it is desirable to contract out of them. They must, however, bear in mind (a) that where it is desired to vary the statutory clauses it will be necessary to set out in detail the obligations which are to be imposed on one or other of the parties in variation of the provisions of the statutory clauses, and (b) that where the agreement embodies a substantial departure from the statutory clauses the party whose interests are adversely affected by the departure may later endeavour to reopen the matter by referring the terms to arbitration. (Section 37 (2).) Consequently, no departure should be made without reasonable justification.

The statutory clauses are comprehensive and in many cases landlords and tenants may be content to accept them. The advisers of tenants should consider, however, whether the obligation to repair

bridges, sewers and watercourses might not cast an unreasonably heavy burden on tenants in certain cases. Special provisions may have to be inserted in agreements in cases where common sewers serve more than one holding. These and other problems will require careful study.

The Agriculture (Calculation of Value for Compensation) Regulations, 1948, have been made under section 25 (1) of the Act. They prescribe the method of calculating the value to an incoming tenant of the improvements and matters specified in Parts I and II of the Fourth Schedule. Part II, it will be remembered, includes " tenant right matters " for which hitherto no statutory compensation has been provided, agreement and custom having been relied on. As regards the tenant right matters specified in Part II of the Fourth Schedule, it is permitted to contract out of the statutory measure of compensation and method of calculation and to substitute a different measure or method in a written tenancy agreement. Thus hay, straw and roots which the tenant has no right to sell off are to be taken at " consuming price ", *i.e.*, at market value less manurial value. This is in accordance with the usual practice. It might, however, be desired, for example, that the first cut of hay of the last season's growth should be taken at market price; if so, a special provision to that effect would have to be put into the agreement. Again, the regulations provide that farmyard manure is to be paid for at the cost to the tenant of loading, carting, heaping and spreading on land from which no crop has been taken. In some districts, however, manure is usually paid for at market price while in others it may pass without any allowance. Here again, if it is desired to vary the statutory method of compensation an express provision must be inserted in the agreement.

SUB-MORTGAGES—THEIR CREATION, REALISATION, TRANSFER AND DISCHARGE

By H. Woodhouse, Solicitor

Introduction

A sub-mortgage is a mortgage of a mortgage. In substance it amounts to a transfer of the principal mortgage subject to a proviso for redemption. Sub-mortgages can, however, give rise to a number of conveyancing problems, the answers to which are not immediately obvious, unless the essence of a sub-mortgage is borne in mind.

Form of Sub-Mortgage

A sub-mortgage in the ordinary form will contain the following main clauses (*Enc. of Forms and Precedents*, 3rd ed., Vol. 10, pp. 712–714, and *Key & Elphinstone*, 14th ed., Vol. 2, p. 244) :—

I. Where the principal mortgage is by demise for a term of years

(whether arising by direct creation or by the operation of Parts VII and VIII of the First Schedule to the L. P. A., 1925)—

(1) a covenant by the sub-mortgagor to pay the principal sum and interest secured by the sub-mortgage;

(2) an absolute assignment of the mortgage debt and of the benefit of any securities for the same (including the powers expressly or impliedly conferred by the mortgage);

(3) a sub-demise of the mortgage term vested in the sub-mortgagor, for the whole of that term less at least one day, or a charge by way of legal mortgage upon that term (which will operate similarly—section 87 (1) (b) of the L. P. A., 1925); and

(4) a proviso for redemption on payment of the sum secured by the sub-mortgage.

II. Where the principal mortgage is a charge by way of legal mortgage or an equitable mortgage—

(1) a covenant by the sub-mortgagor to pay the principal sum and interest secured by the sub-mortgage;

(2) a transfer to the sub-mortgagee of the mortgage debt together with the benefit of all the powers and provisions contained in or conferred by the mortgage, all securities for the same and generally the whole benefit of the mortgage; and

(3) a proviso for redemption on payment of the sum secured by the sub-mortgage.

Where the principal mortgage is a charge by way of legal mortgage or an equitable mortgage, it is suggested in Fisher and Lightwood's *Law of Mortgages* (7th ed.), p. 102, that it is possible, when creating a sub-mortgage, to take advantage of the provisions of section 114 of the L. P. A., 1925. Section 114 (1) is as follows:—

"A deed executed by a mortgagee purporting to transfer his mortgage or the benefit thereof shall, unless a contrary intention is therein expressed, and subject to any provisions therein contained, operate to transfer to the transferee—

(a) the right to demand, sue for, recover, and give receipts for, the mortgage money or the unpaid part thereof, and the interest then due, if any, and thenceforth to become due thereon; and

(b) the benefit of all securities for the same, and the benefit of and the right to sue on all covenants with the mortgagee, and the right to exercise all powers of the mortgagee; and

(c) all the estate and interest in the mortgaged property then vested in the mortgagee subject to redemption or cesser, but as to such estate and interest subject to the right of redemption then subsisting".

If this view is correct, then, where the principal mortgage is by way of legal charge or is an equitable mortgage or charge, it is unnecessary to enumerate separately the items mentioned in II (2) above. It will be enough simply to transfer to the sub-mortgagee the "benefit of the mortgage". The proviso for redemption and the covenant by the sub-mortgagee for repayment will, of course, still be required.

It is clear, however, that this use of section 114 must be limited to cases where the principal mortgage is by way of legal charge or is an equitable mortgage, and should not be extended to cases where the principal mortgage is by demise for a term of years. The reason for

this is that since 1925 a mortgage of a term of years can only be effected by a sub-demise or a legal charge and not by assignment—see section 86 (1) of the L. P. A., 1925, which provides that " a mortgage of a term of years absolute shall only be capable of being effected at law either by a sub-demise for a term of years absolute, less by one day at least than the term vested in the mortgagor . . . or by a charge by deed expressed to be by way of legal mortgage ", and section 86 (3) which states that that provision applies when the mortgage is made by way of sub-mortgage of a term of years absolute. If, nevertheless, a mortgage by demise is sub-mortgaged by a direct transfer under section 114, it would seem that in spite of the express wording of sub-section (1) (c) of section 114 set out above (concerning the effect of a transfer of a mortgage), the sub-mortgage would not operate to vest in the sub-mortgagée *all* the estate and interest of the sub-mortgagor in the mortgaged property, as the case would fall within section 86 (2) of the L. P. A., 1925 (applied to sub-mortgages by sub-section (3)) which provides that any purported assignment of a term of years absolute *by way of mortgage* shall (to the extent of the estate of the mortgagor) operate as a sub-demise of the leasehold land to the mortgagee for a term of years absolute less by ten days than the term expressed to be assigned.

The fact that section 114 cannot operate completely in connection with a sub-mortgage where the principal mortgage is by demise, may perhaps give rise to doubts whether section 114 is really appropriate for use in sub-mortgages at all and may suggest that that section was only intended to be used in cases of out and out transfer. Although there is nothing in section 114 itself to indicate that it is inapplicable to a sub-mortgage, it will probably be prudent in the circumstances to follow the usual practice and not to complicate matters by attempting to make use of section 114 as a short cut. (See *Enc. of Forms and Precedents*, 3rd ed., Vol. 10, p. 711).

Notice to the Principal Mortgagor

Notwithstanding the above remarks, a sub-mortgage is in effect a transfer of the benefit of the principal mortgage and the moneys thereby secured, and consequently it is as important to obtain the concurrence of the principal mortgagor or to give notice to him, when a sub-mortgage is created, as it is when the principal mortgage itself is transferred absolutely.

The basic rule is that the sub-mortgagee (like an out and out transferee) takes the security subject to any equities arising between the principal mortgagor and mortgagee prior to notice of the sub-mortgage being given to the principal mortgagor, and is bound by the actual state of accounts between the principal mortgagor and mortgagee. Thus, for instance, the principal mortgagor may have reduced the mortgage debt or may have a set-off against the mortgagee, and if this is so, the amount of money actually secured by the principal mortgage at the date of the sub-mortgage will not be the sum stated in the principal mortgage deed but that amount less the sum paid off or the subject of the right of set-off. Such a state of affairs may render the principal mortgage valueless as a security in the hands of the sub-mortgagee (see, *e.g.*, *Parker* v. *Jackson*, [1936] 2 All E. R.

281). This rule may, of course, be displaced by the principal mortgagor's own conduct which, in appropriate circumstances, may prevent him from setting up an equity against the sub-mortgagee, *e.g.*, in a case where the principal mortgage deed contains a receipt for the sum expressed to be advanced to the mortgagor, he would be unable to claim, as against a sub-mortgagee who had acted on the faith of the receipt, that only a smaller sum had in fact been advanced (*Bickerton* v. *Walker* (1885), 31 Ch. D. 151).

To obviate the serious consequences which may flow from the application of the above rule, it is in the interest of the sub-mortgagee that the principal mortgagor should join in the sub-mortgage. If he does so, he will have notice of the sub-mortgage and will at the same time be bound by any recitals in the sub-mortgage deed as to the state of the principal mortgage debt. If the principal mortgagor does not join in the sub-mortgage (and in practice he frequently does not), then the sub-mortgagee should take two precautions :—

(a) he should obtain satisfactory evidence of the state of the principal mortgage debt (*e.g.*, by direct inquiry of the principal mortgagor), and

(b) he should give to the principal mortgagor notice in writing of the sub-mortgage as soon as it has been completed.

Should he fail to take precaution (a) but act merely in reliance on the mortgagee's own statement, then the principal mortgagor would not be prevented from asserting against the sub-mortgagee any equity he had against the mortgagee. Should the sub-mortgagee not take precaution (b), he would run the risk that the principal mortgagor might pay off the principal mortgage debt to the mortgagee and would, in addition, take subject to any equities arising after the date of the sub-mortgage but before the principal mortgagor obtained notice of the sub-mortgage, as well as to equities subsisting at the date of the sub-mortgage. Any answer given by the principal mortgagor in reply to an inquiry as to the state of the mortgage debt should be carefully preserved.

Where a sub-mortgage is made in the ordinary form outlined above, it will normally operate as an assignment of the principal mortgage debt taking effect under section 136 of the L. P. A., 1925, as an assignment of a " debt or other legal thing in action ". Section 136 (1), it will be recollected, provides that :—

" Any absolute assignment by writing under the hand of the assignor (not purporting to be by way of charge only) of any debt or other legal thing in action, of which express notice in writing has been given to the debtor, . . . is effectual in law (subject to equities having priority over the right of the assignee) to pass and transfer *from the date of such notice*—

(a) the legal right to such debt or thing in action;

(b) all legal and other remedies for the same; and

(c) the power to give a good discharge for the same without the concurrence of the assignor."

Notwithstanding the words in brackets " (not purporting to be by way of charge only) ", section 136 (1) applies to an assignment by way of mortgage where the chose in action is actually transferred to the mortgagee and the mortgage deed contains a proviso for redemption

in common form (*Tancred* v. *Delagoa Bay Ry.* (1889), 23 Q. B. D. 239—a case upon section 25 (6) of the Judicature Act, 1873, now re-enacted as section 136 of the L. P. A., 1925; but compare *Mercantile Bank* v. *Evans*, [1899] 2 Q. B. 613, which shows that there must be an absolute assignment and not a mere charge by way of security). It will be noted that under section 136 the assignment only operates as a legal assignment when written notice has been given to the debtor and from the date of such notice. As a technical point it is observed that section 114 of the L. P. A., 1925 (relating to transfer of mortgages—as to which see above) contains no similar requirement and presumably the transferee of a mortgage taking a transfer in accordance with the provisions of that section (and also a sub-mortgagee, if the sub-mortgage deed can take effect under section 114) obtains a legal title to the mortgage debt upon the date of the transfer and without giving notice to the mortgagor, though, of course, notice in practice must be given in order to prevent the transferee from being prejudiced by equities as explained above.

Powers of the Sub-Mortgagee

The sub-mortgagee will, of course, be entitled to exercise the ordinary powers of a mortgagee in relation to the subject of his sub-mortgage. In addition, if the sub-mortgage is in one or other of the forms discussed above, the sub-mortgagee will be entitled to exercise the powers conferred by the principal mortgage on the original mortgagee, as such powers will have been expressly or impliedly transferred to him. Thus where the principal mortgage is by deed, the mortgagee will have the statutory powers to sell, to insure and to appoint a receiver (section 101 (1) of the L. P. A., 1925), and these powers, being transferred to the sub-mortgagee by the sub-mortgage, will be exercisable by the sub-mortgagee, apparently to the exclusion of the original mortgagee (*Cruse* v. *Nowell* (1856), 25 L. J. Ch. 709).

Where the sub-mortgagee exercises the powers conferred on the original mortgagee by the principal mortgage, the operation of these powers takes place in the same way and with the same effect as if they had been exercised by the original mortgagee himself. See particularly sections 88 and 89 of the L. P. A., 1925, dealing respectively with the realisation of freehold and leasehold mortgages.

Section 88 of the L. P. A. enables the mortgagee of freehold property (in whom only a term of years or legal charge is vested) to convey the fee simple to a purchaser when he exercises his power of sale, to have the fee simple vested in him when he obtains a foreclosure order absolute and to get in the fee simple when he acquires title under the Limitation Acts. Section 88 (5) relates these provisions to sub-mortgages as follows:—

"In the case of a sub-mortgage by sub-demise of a long term (less a nominal period) itself limited out of an estate in fee simple, the foregoing provisions of this section shall operate as if the derivative term, if any, created by the sub-mortgage had been limited out of the fee simple, and so as to enlarge the principal term and extinguish the derivative term created by the sub-mortgage as aforesaid, and to enable the sub-mortgagee to convey the fee simple or acquire it by foreclosure, enlargement, or otherwise as aforesaid".

Section 89 of the L. P. A., 1925, deals with the realisation of leasehold mortgages and is parallel to section 88. In particular section 89 (5) enables the sub-mortgagee to assign or acquire the head term, notwithstanding that he himself only holds a sub-term.

These provisions illustrate the " transfer " aspect of a sub-mortgage and show the sub-mortgagee exercising the powers conferred by the principal mortgage in the same manner as if he had been the original mortgagee or an out and out transferee. The " mortgage " aspect of the sub-mortgage should, however, not be forgotten, as there is nothing to prevent the sub-mortgagee from exercising a mortgagee's powers over the benefit of the principal mortgage. Thus if Blackacre is mortgaged by deed to X to secure £1,000 and X sub-mortgages his mortgage to Y by deed to secure £500, Y has two courses open to him if he wants to exercise the power of sale: (1) he may sell Blackacre in exercise of the power of sale conferred on X by the principal mortgage and available to Y by virtue of the sub-mortgage, or (2) he may sell the principal mortgage in exercise of the separate power of sale conferred by the sub-mortgage; subject, of course, to his liability in either case to account for any surplus moneys received by him over and above the principal moneys, interest and costs due to him under the sub-mortgage.

Transfers of a Sub-Mortgage

A transfer of a sub-mortgage may be made by deed in accordance with section 114 of the L. P. A., 1925, and the transferee will step into the shoes of the sub-mortgagee. Unless *both the principal mortgagor and the sub-mortgagor* join in the transfer, the transferee must inquire from them concerning the state of the principal mortgage debt and the sub-mortgage debt and must give notice of the transfer to *both of them.* This is important, since the transferee will be the assignee of both the principal mortgage debt and the sub-mortgage debt.

Discharge of Sub-Mortgage and Discharge of Principal Mortgage by Sub-Mortgagee

A sub-mortgage can be discharged by a vacating receipt under section 115 of the L. P. A., 1925, in the ordinary way and no special comment is necessary.

An interesting question arises, however, as to whether the sub-mortgagee can effectually discharge the principal mortgage without the concurrence of the principal mortgagee (the sub-mortgagor). Suppose A mortgages Blackacre to B to secure £1,000 and B mortgages his mortgage for £1,000 to C to secure £500, can C alone validly discharge the principal mortgage or must B join in to surrender the interest vested in him? The only precedent in the precedent books, applicable to such a case, appears to be in *Prideaux*, 23rd ed., Vol. 2, p. 619, where there is given a precedent of a deed of surrender and release to be executed by both the original mortgagee (B) and the sub-mortgagee (C). It is suggested, however, that B's concurrence is unnecessary, at any rate where the sub-mortgage is in the common form described above, as the principal mortgage debt will have been assigned to C by the sub-mortgage and C will, as legal assignee, have " power to give a good discharge for the same without the concurrence

of the assignor " (section 136 (1) (c) of the L. P. A., 1925); and see also section 114 (1) (a) of the L. P. A., 1925.

The same conclusion appears to follow from section 107 (1) of the L. P. A., 1925, which provides that " the receipt in writing of a mortgagee shall be a sufficient discharge . . . for any money or securities comprised in his mortgage, or arising thereunder ", as read in conjunction with the definition of " mortgagee ", given in section 205 (1) (xvi), as including " any person from time to time deriving title under the original mortgagee "—this would include a sub-mortgagee.

In fact, during the subsistence of the sub-mortgage, the sub-mortgagee (after notice has been given to the principal mortgagor) is the only person who can give a valid receipt for the principal mortgage debt, as he is the assignee of it (see *Re Burrell*, L. R. 7 Eq. 399, at p. 407).

Once the sub-mortgagee has received the moneys due under the principal mortgage, the principal mortgage term will become a satisfied term and will cease; see section 116 of the L. P. A., 1925, which provides that (subject to certain rights to have the term kept alive not here material), " a mortgage term shall, when the money secured by the mortgage has been discharged, become a satisfied term and shall cease ".

The money received by the sub-mortgagee on repayment of the principal mortgage must be applied in like manner as money received by him arising from a sale under the power of sale (section 107 (2) of the L. P. A., 1925), that is to say, he will be entitled to retain thereout the principal money, interest and costs due to himself under the sub-mortgage but must pay the balance (if any) to the " person entitled to the mortgaged property "—here to B, the person who is original mortgagee and sub-mortgagor (section 105 of the L. P. A., 1925).

Whether in the case envisaged the sub-mortgagee can execute a vacating receipt under section 115 of the L. P. A., 1925, so as to discharge the principal mortgage is, perhaps, less clear. Section 115 (1) is as follows :—

" A receipt endorsed on, written at the foot of, or annexed to a mortgage for all the money thereby secured, which states the name of the person who pays the money and *is executed by the chargee by way of legal mortgage or the person in whom the mortgaged property is vested and who is legally entitled to give a receipt for the mortgage money*, shall operate without any reconveyance, surrender or release—

(a) where a mortgage takes effect by demise or sub-demise, as a surrender of the term, so as to determine the term or merge the same in the reversion immediately expectant thereon;

(b) where the mortgage does not take effect by demise or sub-demise, as a reconveyance thereof to the extent of the interest which is the subject-matter of the mortgage, to the person who immediately before the execution of the receipt was entitled to the equity of redemption;

and in either case, as a discharge of the mortgaged property from all principal money and interest secured by, and from all claims under the mortgage, but *without prejudice to any term or other interest which is paramount to the estate or interest of the mortgagee or other person in whom the mortgaged property was vested* ".

The italicised portions are relevant to this discussion.

The italicised passage at the commencement of the sub-section describes the person who is to execute the receipt. The description falls into two parts, *viz.* :—

(1) " the chargee by way of legal mortgage ",

(2) " the person in whom the mortgaged property is vested and who is legally entitled to give a receipt for the mortgage money ".

Does the sub-mortgagee fall within alternatives (1) or (2)?

Clearly, alternative (1) can only apply when the principal mortgage is by way of legal charge. Whether it does apply depends on whether the sub-mortgagee can be regarded as the " chargee by way of legal mortgage ". Section 205 of the L. P. A., 1925, does not define this phrase so as to extend it to the person deriving title under the original chargee, though it does in sub-section (1) (xvi) state that the word " mortgagee " includes a chargee by way of legal mortgage and any person from time to time deriving title under the original mortgagee. Now, if the sub-mortgage is made in the form outlined above, the sub-mortgagee will become the transferee of the benefit of the legal charge. The question, therefore, is whether the phrase " chargee by way of legal mortgage " can be regarded as including the transferee from the original chargee, in the same way as by section 205 (1) (xvi) the word " mortgagee " is extended to include a transferee from the original mortgagee. Logically this does not directly follow from the definition in section 205 (1) (xvi), but it is submitted that a similarly extended meaning must be given to the phrase " chargee by way of legal mortgage ", unless the scope of section 115 is to be unduly restricted. If a charge by way of legal mortgage is transferred absolutely (not by way of sub-mortgage) to X, it is thought that there can be no doubt that X can properly execute a vacating receipt under section 115 and that no deed of surrender and release is necessary. If this is so, it must depend on the giving of an extended meaning to the words " chargee by way of legal mortgage " in section 115, as the chargee or his transferee would not fall within alternative (2) above because the mortgaged property is not really " vested " in the chargee at all.

Alternative (2) is only relevant to the case where the principal mortgage is not by way of legal charge. Whether it does apply depends on whether the sub-mortgagee falls within the words " the person in whom the mortgaged property is vested and who is legally entitled to give a receipt for the mortgage money ". Clearly he satisfies the second half of the phrase (" who is legally entitled to give a receipt for the mortgage money ") as a result of sections 107 (1) and 136 of the L. P. A., 1925 (see above). Can it be said, however, that the mortgaged property is vested in him? In a sense it cannot, because the entire estate of the original mortgagee is not vested in him, but only a sub-term; but in a sense it can, because it is possible to say, loosely, that (say) Blackacre is vested in him for a term of 3,000 years less ten days. It is thought that the looser sense of the phrase " mortgaged property " must apply here, for the clause must clearly cover the original mortgagee (unless section 115 is to be otiose); whereas if " mortgaged property " is equated with " fee simple " or " other the estate of the mortgagor ", the clause would not cover the original mortgagee, as the fee simple or head term is not vested in the original

mortgagee but only a term of years or a sub-term as the case may be. In other words "mortgaged property" must mean Blackacre itself and not the mortgagor's or sub-mortgagor's estate in Blackacre.

If the above argument is correct, it follows that the sub-mortgagee (whether the principal mortgage be by legal charge or by demise) falls within the wording of section 115 (1) as first italicised above. It is not thought that the applicability of section 115 is affected by the second italicised passage above ("without prejudice to any term or other interest which is paramount to the estate or interest of the mortgagee or other person in whom the mortgaged property was vested"), since a discharge of the principal mortgage by the sub-mortgagee does not prejudice the original mortgagee, as the sub-mortgagee must, after satisfying his own claim under the sub-mortgage, hold the balance upon trust for the person entitled to the mortgaged property (here the original mortgagee).

It follows from this discussion that on the example set out above, the sub-mortgagee C alone can validly discharge the principal mortgage made between A and B, and that a vacating receipt endorsed on that mortgage and signed by C will suffice for all purposes, B's concurrence being unnecessary.

It is open to question whether the receipt discharging the principal mortgage should be endorsed on the principal mortgage deed or whether it may instead be endorsed on the sub-mortgage deed. The relevant statutory provision is section 115 (7) of the L. P. A., 1925, which states :—

"Where the mortgage consists of a mortgage and a further charge or of more than one deed, it shall be sufficient for the purposes of this section, if the receipt refers either to all the deeds whereby the mortgage money is secured or to the aggregate amount of the mortgage money thereby secured and for the time being owing, and is endorsed on, written at the foot of, or annexed to one of the mortgage deeds".

In view of the fact that a sub-mortgage is in substance a transfer of the principal mortgage to the sub-mortgagee, it might, perhaps, be argued that the sub-mortgage deed becomes one of the "principal mortgage deeds" and that a receipt discharging the principal mortgage can validly be endorsed on the sub-mortgage deed. It is not, however, certain that a transfer of a mortgage ought to be regarded as one of the "mortgage deeds" for the purpose of section 115 (7), and the view is expressed in Wolstenholme and Cherry's *Conveyancing Statutes*, 12th ed., Vol. 1, p. 431, that it is preferable that a transfer should not be treated as one of the "mortgage deeds" for this purpose. If this is correct, a sub-mortgage should be treated on the same footing as a transfer and the receipt discharging the principal mortgage should be endorsed on that mortgage deed and not on the sub-mortgage deed.

Registered Land

Sub-mortgages of registered land are dealt with in section 36 of the L. R. A., 1925, which, briefly, states that rules may be made for applying the provisions of the L. P. A., 1925, and the L. R. A., 1925, to charges by way of sub-mortgage.

The relevant rules are the Land Registration Rules, Nos. 163–166. Rules Nos. 163 and 164 are germane to this discussion. Rule 163 provides as follows :—

" (1) The proprietor of a charge or incumbrance may at any time charge the mortgage debt with the payment of money in the same manner as a proprietor of land can charge the land; and such charges are in these rules referred to as sub-charges.

(2) The proprietor of a sub-charge shall, subject to any entry to the contrary in the register, have the same powers of disposition in relation to the land as if he had been registered as proprietor of the principal charge ".

Although the word " disposition " is not defined in the L. R. A., 1925, the view is expressed in Brickdale's *Land Registration Act*, 1925, 4th ed., p. 406, that sub-paragraph (2) of rule 163 entitles the proprietor of the sub-charge to discharge the principal charge.

Rule 164 provides as follows :—

" (1) A sub-charge shall be completed, transferred and discharged in the same form and manner as a charge.

(2) Subject to any entry in the register to the contrary—

(a) a sub-charge shall, as against the person creating it, imply the same covenants and, against that person and all persons over whose interests the charge confers power, confer the same powers and have the same effect as a charge;

(b) registered sub-charges on the same charge or incumbrance shall, as between themselves, rank according to the order in which they are entered on the register and not according to the order in which they are created ".

If the original chargor does not join in the sub-charge, inquiry should be made of him as to the state of the principal mortgage debt, as in the case of unregistered land. Similarly, also, notice of the sub-charge should, it seems, be given to the principal chargor. While this may not strictly be necessary to preserve the capital, where the sub-charge has been registered, it will in practice be desirable to give the principal chargor express notice of the sub-charge so as to prevent his attempting to pay off the moneys due under the principal charge to the original chargee.

Summary

By way of summary the following practical points in connection with sub-mortgages may be noted :—

(1) A sub-mortgage should be made in one of the forms mentioned at the beginning of this article, as it is considered that the provisions of section 114 of the L. P. A., 1925, should not be relied upon when drawing sub-mortgage deeds.

(2) If the principal mortgagor does not join in the sub-mortgage, inquiry must be made of him as to the state of the principal mortgage debt and written notice must be given to him of the sub-mortgage.

(3) If the sub-mortgage is properly drawn the sub-mortgagee will be in a position to exercise all the powers conferred on the original mortgagee by the principal mortgage deed in the same manner and with

the same effect as such powers could have been exercised by the original mortgagee.

(4) When a sub-mortgage is transferred, inquiries as to the state of the principal and sub-mortgage debts must be made of the principal and sub-mortgagors respectively and notice of the transfer must be given to both of them.

(5) A sub-mortgagee can, if the sub-mortgage is properly drawn, effectively discharge the principal mortgage without the concurrence of the sub-mortgagor, and a vacating receipt enclosed on the principal mortgage deed and signed by the sub-mortgagee alone is effective for this purpose. Conversely the original mortgagee cannot, during the subsistence of the sub-mortgage, discharge the principal mortgage.

(6) The above rules, with modifications appropriate to registered land, apply to registered sub-charges of registered land.

INFANT SETTLEMENTS

By Desmond Miller, Barrister-at-Law

In view of the progressive steps in legislation since 1922 the parent/settlor is today faced with many problems in the attempt to make provision for his infant children in a manner which is likely to attract the least possible burden of taxation, be it by way of income tax or death duty, upon the capital or income of the settled funds. This article deals with two aspects of the matter which are, for obvious reasons, of constant recurrence.

Accumulations

No requirement as to accumulation is expressed by any provision of the relevant Taxing Acts, but is to be inferred from section 21 of the Finance Act, 1936, which provides by sub-section (1), " Where . . . during the life of the settlor any income is paid to or for the benefit of a child of the settlor in any year of assessment, the income shall, if at the commencement of that year the child was an infant and unmarried . . . be treated as the income of the settlor ". This section will clearly apply to income vested in the beneficiary *ab initio*, despite a direction to accumulate, hence the consequent necessity to postpone vesting of interest against a future contingency.

It is in these circumstances that the question of accumulation falls to be considered. Now, provided that the trust carries the intermediate income (as will be normal) there is power to accumulate during minority under section 31 of the Trustee Act, 1925, but this statutory power ceases on the beneficiary's attainment of majority, and he will thereupon be entitled to call upon the trustees (subject to the terms of settlement) to pass his interest, as represented by the then accumulated fund, to him.

If, therefore, the settlor is living at the relevant date it follows that in part at least the conditions of section 21 (1) of the 1936 Act

(*supra*) have been satisfied and that that portion of the moneys passing which represents income will be treated as though part of the settlor's income for the purpose of charge of surtax. The question as to the extent of liability here is not clear, and requires reference to the provisions of section 21 (3) (b) of the Finance Act, 1936, which, it will be remembered, provide that any "sum" paid during minority shall be deemed for the purpose of section 21 (1) (*supra*) to be paid as "income".

This sub-section, *i.e.* 21 (3) (b), while not primarily directed to the circumstance here envisaged, is, with the possible exception of interests limited for life to income arising from the settled funds, in the writer's submission sufficiently widely drawn to attract tax upon the settlor to the extent of the whole of the income accumulations then passing.

To obviate this consequence it is therefore necessary to postpone vesting of interest until a year of assessment at the commencement of which the beneficiary is neither infant nor unmarried, and by reason of the incidence of estate duty, which renders it desirable to accelerate vesting, the age normally selected will be twenty-two years.

As indicated above the statutory power of accumulation ceases with the beneficiary's minority, and thereafter can only be effected under express power contained in the settlement. Here the settlor is limited as to period by the provisions of section 164 of the Law of Property Act, 1925; of the four alternatives there prescribed there are two only which can be regarded as effective to the issue in point, namely:—

"(1) the life of the grantor or settlor, or

(2) the duration of the minority or respective minorities only of any person or persons who under the limitations of the instrument directing the accumulations would, for the time being, if of full age, be entitled to the income directed to be accumulated."

For the reasons already given the period selected must almost inevitably be "the life of the settlor", and therefore the normal instrument of settlement will:—

(1) make vesting of interest contingent upon the attainment of the age of twenty-two years by the beneficiary.

(2) direct accumulation during the life of the settlor or until the beneficiary attains twenty-two years of age, "whichever period be the shorter".

So far the writer's observations have been directed to the aspect of charge to surtax, but the incidence of estate duty now falls to be considered. It may, of course, be that the saving of such duty is of prime concern and in this case vesting in the beneficiary will be effected on his attainment of majority despite the consequential charge to surtax falling on the settlor in such year. Assuming, however, as is usual, that the settlor desires to obtain the best of both worlds, he will have adopted what is above referred to as the normal instrument of the settlement; in this, the simple case, there is no question of change in the beneficial interest by reason of the settlor's death, and if such death occurs before the beneficiary's attainment of twenty-one years of age, accumulation may be continued under the statutory power contained in section 31 of the Trustee Act, 1925 (*supra*); on the other hand,

should the death occur during the year in which the beneficiary attains majority there is then no power to accumulate either by law or in equity, the income of that year will result to the settlor's estate, and the fund (including accumulations) will pass under section 1 of the Finance Act, 1894. Cf. *Re Bourne's Settlement Trusts, Bourne* v. *Mackay*, 115 L. J. Ch. 152.

For this reason, irrespective of the provisions of section 38 (3) of the Finance Act, 1938, the instrument of settlement must be so drawn that, in the event of the settlor's death within the limits of time indicated, the income arising from the accumulated fund will thereupon be payable to the beneficiary until he attains his vested interest at twenty-two years of age.

If this be done, then in the writer's submission the only interest passing or which will be deemed to pass for the purpose of charge to estate duty will be the income arising from the settled fund, as then accumulated, in the year of the settlor's death.

Reservations

It is well known that settlements of this nature, if they are to be effective to prevent aggregation of income arising thereunder with income of the parent settlor for purpose of charge to surtax, must be irrevocable.

The statutory requirements in this connection are clearly set out, first by section 21 (8) of the Finance Act, 1936, which by sub-section (8) (a) provides, in substance, that if during the life of any child of the settlor being a beneficiary under the settlement;

(1) the settlor is entitled to any benefit thereunder, or

(2) the husband or wife of the settlor, during the settlor's lifetime, is entitled to any like benefit,

the settlement shall not be deemed to be irrevocable.

The wide definitions of "settlement" and "settlor" for this purpose, as appearing by section 21 (9) (b) and (c) of the 1936 Act (*supra*) should be noted; and in addition the opening words to section 21 (8), following, which operate to limit its scope, namely, "if the terms thereof provide", *i.e.* it is only where the settlement by its terms provides for these benefits to the settlor or the husband or wife of the settlor that the statutory implication of revocability arises: cf. *Wolfson* v. *C. I. R.*, [1947] 2 All E. R. 150.

Again where the settlement itself provides:

(1) for determination by the act or on the default of any person, or

(2) for the payment of any penalty by the settlor in the event of his failing to comply with the provisions of the settlement,

it will not be deemed to be irrevocable: section 21 (8) (b), (c), Finance Act, 1936.

The proviso to the section enacts that the settlement will not, however, be deemed revocable by reason only that it provides that the income or assets may become payable to the settlor or the husband or wife of the settlor, on the bankruptcy of, or an assignment or charge by, the beneficiary; that it provides for determination, where such determination will not during the beneficiary's lifetime benefit any person other than the child or his/her wife, husband or

issue; or that it directs income to be held on protective trusts under section 33 of the Trustee Act, 1925, unless the trust period be less than the life of the child.

Secondly, and irrespective of the foregoing the existence of a power of revocation may give rise to a charge to surtax upon the settlor under section 38 (2) of the Finance Act, 1938, where such power arises in virtue of the terms of settlement, and upon its exercise the settlor, or the husband or wife of the settlor, will or may become beneficially entitled to the whole or part of the settled property, or the income arising therefrom.

Thirdly, income arising and *undistributed* during the life of the settlor may give rise to a charge upon him under the provisions of section 38 (3) of the Finance Act, 1938, where "any income or property which may at any time arise under or be comprised in that settlement is or will or may become payable to or applicable for the benefit of the settlor or the wife or husband of the settlor in any circumstance whatsoever".

The proviso to this sub-section limits the charge by the extent of the settlor's interest, but the exemptions, where the settlor is not deemed to have such a chargeable interest are set out by section 38 (4) of the Finance Act (*supra*). Thus, the sub-section will not apply where the income or property is payable or applicable, as indicated, only—

(1) on bankruptcy, assignment or charge of income by the beneficiary,
(2) in marriage settlements, on the death of both parties, and all or any children,
(3) on death under that age of a beneficiary entitled at twenty-five years,
(4) so long as there subsists a life interest, and a beneficiary living and under the age of twenty-five years, during whose life payment or application to/for the settlor's benefit can only take place on bankruptcy, assignment or charge.

Lastly, section 28 of the Finance Act, 1946, has imported added restrictions, requiring the precise identification of beneficiaries and limiting the effectiveness of settlements in favour of persons in the service of the settlor, which will be applicable *unless* the settlor has divested himself absolutely of the settled property in question.

No reference is made to any interest arising in favour of the husband or wife of the settlor, but otherwise the exemptive conditions in section 28 (2) of the Finance Act, 1946, follow closely those of section 38 (4) of the Finance Act, 1938.

To generalise, in order that a settlement should be effective to prevent aggregation of income for the purpose of charge to surtax:—

(1) there must be no power of revocation arising by virtue of the terms of settlement,
(2) the beneficiaries must be identified (in terms of section 28 of the Finance Act, 1946) or, the settlor must, by the settlement, divest himself absolutely of the property settled,
(3) there must be no reservation of interest, express or to be implied, in favour of the settlor or the husband or wife of the settlor.

The following specific points are worthy of note in considering the terms of any proposed settlement: first, if protective trusts are applied the settlor, and the husband or wife of the settlor, should be excluded from any possible benefit under section 33 (1) (ii) (b) of the Trustee Act, 1925; secondly, a power to appoint by will or codicil in favour of the husband or wife of the settlor may be a reservation of interest within section 38 (3) of the Finance Act, 1938. Cf. *C. I. R.* v. *Gaunt*, [1941] 1 K. B. 706; *C. I. R.* v. *Tennant* (1942), 167 L. T. 159; thirdly, the terms of settlement may extend beyond the specific document dealing with the limitations of trust, *C. I. R.* v. *Payne* 110 L. J. K. B. 323; and contrast *Wolfson* v. *C. I. R.* (*supra*); lastly, the existence of an ultimate trust arising in favour of the settlor is not sufficient to constitute a reservation of interest or, subject to his survival for the period of five years as required by the Finance Act, 1946, to render estate duty payable at his death on the capital value of the settled funds.

RECENT DEVELOPMENTS IN NULLITY OF MARRIAGE

By R. H. Graveson, Ph.D., S.J.D., LL.M., of Gray's Inn, Barrister-at-Law

The recent decision of the Court of Appeal in *De Reneville* v. *De Reneville* (*a*) calls for a fundamental re-orientation of traditional legal ideas in at least one aspect of nullity of marriage, and throws light on some of the darker corners of this highly unsatisfactory branch of law. Although the case did not deal with the effect of annulment of marriage on existing marriage settlements or separation agreements, the importance of its decision is not limited to those called upon to advise on matrimonial causes.

In this case the wife had petitioned for a decree of annulment of marriage on the alternative grounds of incurable incapacity of the husband and of his wilful refusal to consummate the marriage. The husband was a Frenchman at all material times domiciled and resident in France. The wife was an Englishwoman domiciled and resident in England before her marriage. The parties were married in Paris in 1935 and lived together in France and other parts of the French Empire. In 1940 the wife left her husband and returned to live in England, where she continued to reside until the institution of these proceedings. The husband entered an appearance to his wife's petition for nullity, protesting that the Court had no jurisdiction, because proof of the grounds alleged in the petition would render the marriage voidable only and the wife would, therefore, retain her husband's domicil in France. Jones, J., who dealt with the case at first instance (*b*) on the preliminary issue of jurisdiction, held that the marriage, being voidable, the wife was domiciled in France and that the Court had no jurisdiction to entertain her petition on the sole basis of

(*a*) [1948] 1 All E. R. 56.
(*b*) [1947] 2 All E. R. 112.

her residence in England when, in the first place, no circumstances of hardship existed and, secondly, the husband had protested against the Court's exercise of jurisdiction. Against this decision the wife appealed.

The Court of Appeal (Lord Greene, M.R., Bucknill and Somervell, L.JJ.) unanimously dismissed the wife's appeal, but raised, perhaps, problems no less important than those it solved. They may be stated as follows :—

1. By what law is the nature of the causes for which a marriage may be annulled, or declared null and void, to be determined?
2. By what law is the essential validity of a marriage to be determined?
3. What is the distinction between a void and a voidable marriage?
4. Does the wife acquire the domicil of her husband if their marriage is defective?
5. Have the English Courts jurisdiction in the particular case if the marriage is void?
6. Have the English Courts jurisdiction in the particular case if the marriage is voidable?
7. Does the fact that a petition is undefended extend the jurisdiction of the English Courts?

Overriding many of these questions is that of the effect to be given to the greater part of the main judgment in this case, that of the Master of the Rolls, which, in the absence of evidence of French law, proceeded on alternative hypotheses that the marriage was either void or voidable.

1. The Nature of Grounds for Annulment

It has hitherto been assumed by English Judges and lawyers alike firstly, that the causes for which English Courts would hold a marriage void or voidable were those, and only those, so declared by English law, wherever the marriage was performed or whatever the domicils of the parties at the time of celebration; secondly, that the legal consequence of some defect in the marriage must always be that which English Courts would attribute to a corresponding defect in a void or voidable marriage governed entirely by English law. In other words, the causes for which a marriage would be declared void or voidable were treated by English Courts as of the same nature as the grounds upon which a marriage could be dissolved by divorce. In neither nullity nor divorce has the Court hitherto been prepared to sanction the importation into English law of grounds for dissolution or annulment existing under any foreign law with which the marriage may in its origins, or subsequently, have been connected. These propositions are too well known to require citation of authorities, but two illustrations will suffice to explain them. In *White* v. *White* (*c*), Bucknill, J., declared void the purported marriage of a domiciled Englishwoman with a man domiciled either in Malta or Australia, on the ground of bigamy, without inquiring what would be the legal nature of such a second marriage under the law of the husband's domicil. Again, the House of Lords in *Salvesen* v. *Administrator of Austrian*

(*c*) [1937] P. 111.

Property (*d*), held void in England a marriage celebrated abroad in disregard of the form of the *lex loci celebrationis*, not because such disregard rendered the marriage void under the law of the place where it was performed, but because the marriage was void under the English conflicts rule requiring compliance with the forms of the law of the place of celebration. Hitherto, English Courts have been able to decide whether a marriage would be void or voidable, assuming the defect alleged to be capable of proof, because they have given to the facts alleged the legal meaning put upon them by English municipal law. From this simple and rational starting point the Courts have reached a position which, before this recent decision of the Court of Appeal, could, perhaps, be stated as follows :—

(a) Any case of nullity involving a foreign element, whether the marriage was alleged to be void or voidable, might raise a question of choice of jurisdiction.

(b) Any case involving a foreign element in which a marriage was alleged to be valid or void might raise also a question of choice of law through the application of the English conflicts rules which govern the essentials of a marriage by the law of the domicil of each party immediately before marriage and the formalities by the law of the place where the marriage was celebrated. Once the Court had ascertained, through the application of the appropriate law, whether or not all essential and formal requirements had been observed, the effect given to the facts so proved was that which would have been given by purely English municipal law in a domestic case. The choice of law was thus subordinate to the main question of the application of English grounds for nullity in their English sense.

(c) No case in which a marriage was alleged to be merely voidable could on the narrow issue of voidability raise a question of choice of law, since the validity of the marriage on the ground of compliance with the essentials and formalities was not in question, and the grounds of voidability were those provided by English law in its municipal sense. In short, the causes for annulment were regarded in a somewhat similar light to remedies and governed by the *lex fori*.

This traditional view of the grounds of annulment of a voidable marriage must now be considered in the light of the Court of Appeal's decision in *De Reneville* v. *De Reneville* (*e*), a decision which so far created new law that neither party had anticipated the need to produce evidence of the French law of nullity of marriage which the decision required. In the view of the Court, whether the petitioning wife was domiciled in England for purposes of jurisdiction rightly depended on whether her marriage was void or voidable. In the latter event she would retain her husband's French domicil. But the nature of the marriage as void or voidable on the grounds of incapacity or wilful refusal to consummate (both of which are, of course, grounds for treating a marriage to which English law applies as voidable), must

(*d*) [1927] A. C. 641.
(*e*) [1948] 1 All E. R. 56. Other members of the Court concurred in this view.

be determined as a preliminary question by the English Court through reference to the proper law of the marriage.

"In my opinion", stated Lord Greene, M.R. (*f*), "the question of whether the marriage is void or merely voidable is for French law to answer. My reasons are as follows. The validity of a marriage so far as regards the observance of formalities is a matter for the *lex loci celebrationis*. But this is not a case of forms. It is a case of essential validity. By what law is that to be decided? In my opinion, by the law of France, either because that is the law of the husband's domicil at the date of the marriage or (preferably, in my view), because at that date it was the law of the matrimonial domicil in reference to which the parties may have been supposed to enter into the bonds of marriage".

From the analogy of the question of choice of law arising in cases of marriages void according to the English conflict of laws (*g*), the Court of Appeal has thus introduced the question of choice of law into cases of marriages regarded by English municipal law, and hitherto by the English conflict of laws, as voidable, through the classification of grounds for annulment in such marriages as matters of essentials of the same nature as capacity to marry. While we may respectfully agree that the causes of annulment do not pertain to the formalities of marriage, it seems no less difficult on rational grounds to classify them as essentials. The absence of an essential renders a marriage absolutely void. If its effect were less than that it could not properly be considered an essential. But the causes of annulment of a voidable marriage, for example, impotence, in no way affect the validity of a marriage until they are made the basis of a decree of annulment. On this ground alone it seems unfortunate, if one may indulge in understatement, to regard them as essentials in the sense of indispensable prerequisites to the creation of a valid marriage (*h*).

A stronger reason against the classification of causes for annulment of a voidable marriage as "essentials" lies in the nature of those causes themselves. None of them goes to the questions of capacity to enter into marriage, prohibitions against marriage, or the Christian nature of marriage itself (*i*). The case against impotence as the lack of an essential in marriage has been indirectly but substantially weakened by the decision of the House of Lords in *Baxter* v. *Baxter* (*k*). Furthermore, the wording of the Matrimonial Causes Act, 1937, s. 7 (1), introducing the four new statutory grounds of voidability of marriage, argues decisively in favour of treatment by an English Court of the grounds specified as making any marriage voidable only (*l*). English law does not accept the canon law requirement of consummation to

(*f*) *Id.*, at p. 61.

(*g*) Citing *Salvesen* v. *The Administrator of Austrian Property*, [1927] A. C. 641.

(*h*) In overruling the recent decision of Barnard, J., in *Robert* v. *Robert*, [1947] 2 All E. R. 22, the Court of Appeal rejected (though on other grounds) the only reported case known to the present writer which constituted a precedent for applying to a voidable marriage the English rules of choice of law, by treating the particular defect, wilful refusal to consummate, as "a new impediment to marriage" rather than simply as a cause of voidability.

(*i*) See judgment of Lord Jowitt, L.C., in *Baxter* v. *Baxter*, [1947] 2 All E. R. 886.

(*k*) [1947] 2 All E. R. 886.

(*l*) "In addition to any other grounds on which a marriage is by law void or voidable, a marriage shall be voidable on the ground—(a) etc.".

validate a marriage, a requirement which finds a place in many civil law systems. Finally, though four of the five grounds of voidability must exist, if at all, at the creation of the marriage, the fifth, that of wilful refusal to consummate, must necessarily arise after the marriage is celebrated (*m*), and can only be regarded as an essential in the creation of marriage by a process of reasoning based on both legal and biological fiction.

It is certainly no argument against the classification made by the Court of Appeal that its reasoning and decision on this point are unprecedented. To maintain otherwise would be to deny to our Judges their most valuable law-creative function. But it is, perhaps, noteworthy, that the decision purports in effect to change in a material respect the settled practice and principle of law of long standing, without expressly adverting to the change that it was making; and while, perhaps, it does not contradict the decision of the House of Lords in the *Salvesen Case* (*n*), it goes far beyond the reasoning which is found there.

2. By What Law is the Essential Validity of a Marriage to be Determined?

Having decided that the alleged grounds of voidability must be treated as essentials in the creation of the marriage, the Court felt itself bound to state the law by which the essentials should be governed. The formidable and familiar line of precedent on this point, of which the outstanding decision is that of the House of Lords in *Brook* v. *Brook* (*o*), justified the general acceptance of Dicey's statement of the law as, with one exception irrelevant to this issue, the need for each party to a marriage to fulfil the essential requirements of the law of his or her domicil at the time of marriage (*p*). The difficulties which could arise from this state of law, requiring possible reference to the law of two different domicils, prompted Professor Cheshire to advocate the reference of essentials to a single law, that of the matrimonial domicil of the parties (*q*); and though the learned writer abandoned the expression "matrimonial domicil" in this connection in the most recent edition of his work (*r*), the Court of Appeal has given *ex post facto* judicial approval to the term in relation to the essentials of marriage. The relevant passage of Lord Greene, M.R.'s judgment has been cited above. Even stronger are the words of Bucknill, L.J. (*s*) in dealing with the question of whether the Court, in deciding whether or not it had jurisdiction to make a decree of nullity on the ground of incurable impotence, should apply English or French law as to the legal effect of impotence on the validity of the marriage. In his view the English Court in answering this question, "should be guided by French law. The wife consented to marry her husband in France and intended to live with him there and also impliedly intended to take her husband's French domicil on the assumption that the marriage was

(*m*) See *Dredge* v. *Dredge*, [1947] 1 All E. R. 29.
(*n*) [1927] A. C. 641.
(*o*) (1861), 9 H. L. C. 193.
(*p*) Dicey, *Conflict of Laws*, 5th ed., p. 732.
(*q*) *Private International Law* (1935), pp. 154 ff.
(*r*) *Op. cit.*, 3rd ed. (1947), pp. 269 ff.
(*s*) [1948] 1 All E. R. at p. 65.

valid. In these circumstances it seems to me that the question as to the validity of the marriage should be decided by French law". The grounds for this conclusion were not to be found in judicial precedent, but in reasonableness, for Bucknill, L.J., continued, "To hold that the law of the country where each spouse is domiciled before marriage must decide as to the validity of the marriage in this case might lead to the deplorable result, if the laws happened to differ, that the marriage would be held valid in one country and void in the other country. For this reason I think it essential that the laws of one country should prevail and that it is reasonable that the law of the country where the ceremony of marriage took place and where the parties intended to live together and where they, in fact, lived together should be regarded as the law which controls the validity of their marriage". So far, indeed, as precedent was concerned this part of the Court's judgment was almost *sub silentio*, for the only authority adduced in support was a passage from the judgment of Lord Campbell, L.C., in *Brook* v. *Brook* (*t*), cited by the Master of the Rolls. Not only does this particular passage, in referring to "the law of the country in which *the parties are domiciled at the time of the marriage*", fail to support the conclusion of the Court of Appeal, but the facts of *Brook* v. *Brook* differed substantially from those in the present case, and rendered any reference to the matrimonial domicil or residence unnecessary for the decision. It will be remembered that the earlier case involved the marriage in Denmark of two British subjects domiciled in England, who returned to England shortly after the marriage in Denmark had been performed. No reference was made by the Court of Appeal to the recent decision of *Re Paine* (*a*), governing the essentials in marriage by the law of each party's domicil immediately before marriage.

It is not proposed to discuss here the merits of these competing opinions as to the law which should govern the essentials in marriage, for the practitioner is primarily interested in law that is rather than law that ought to be. Much can be said in favour of the principle of referring the essentials in marriage to the proper law of the marriage by analogy to the general law of contract (*b*). Leaving aside the merits of the doctrine, what is now the law? It is suggested that the view adopted by the Court of Appeal in *De Reneville's Case* can have no higher value than dicta, though being the unanimous opinion of a strong Court, dicta of great weight. For, in the first place, no English precedent is known to the writer in which the essentials of marriage have been governed by the law of the matrimonial domicil in the sense of the law of the country in which the parties intended to make their home after marriage, when such law has differed from that of their respective domicils before marriage (*c*). Indeed, the

(*t*) (1861), 9 H. L. C. 193, at p. 207: "But while the forms of entering into the contract of marriage are to be regulated by the *lex loci contractus*, the law of the country in which it is celebrated, the essentials of the contract depend on the *lex domicilii*, the law of the country in which the parties are domiciled at the time of the marriage, and in which the matrimonial residence is contemplated".

(*a*) [1940] Ch. 46.

(*b*) See the present writer's article, XX Journal of Comp. Leg. (1938), 55.

(*c*) In *Sottomayor* v. *de Barros* (*No* 2) (1879), L. R. 5 P. D. 94, the parties, being young children, had no intention whatever in respect of the establishment of a common or matrimonial residence in England or elsewhere.

cases point the other way. Secondly, the Court did not consider the precedents on this point, with the exception of the limited reference to *Brook* v. *Brook* (*d*). Thirdly, having decided that the effect of the causes of voidability alleged must be determined by the law governing the essentials in marriage, it was unnecessary for the Court to do more than follow the line of precedents already deciding what law governs those essentials. But the Court's opinion, though it may be no more than dicta, will in all probability constitute a starting-point for new and welcome developments in the law.

If we try to envisage possible situations under the Court's interpretation of the law of nullity, difficulties become apparent which may necessitate the invoking of some such doctrine as public policy. Assume, for example, that a domiciled Englishwoman in 1939 married in Germany a domiciled German, intending to live with him in Germany. Since the outbreak of war the wife has lived in England. In 1948, both parties being domiciled in England, the husband petitions for a decree of annulment on the ground that he was unaware at the date of marriage of his wife's communistic political views. By German law in 1939 the marriage would have been voidable. On the reasoning of the Court in *De Reneville's Case*, the legal effect of this cause of annulment must be referred to the law governing the essentials of marriage, that is, German law in 1939. The German and Austrian Marriage Law of 1938 has now been replaced by Control Council Law No. 16, of February 20, 1946; but equally difficult situations may still arise. Nullity of marriage under present German law can be declared for various causes having no counterpart in English law, such as the case of the contracting of a marriage primarily for the purpose of enabling the wife to bear the husband's surname (*e*); and a marriage may still be annulled for error regarding the personal characteristics of the other partner (*f*). It is, perhaps, unnecessary to multiply examples by reference to other foreign legal systems.

3. The Distinction Between a Void and a Voidable Marriage

Distinctions of various kinds and for various purposes may be drawn between void and voidable marriages, for example, as to jurisdiction, as to the legitimacy of children, as to the persons who can contest the validity of the defective marriage, as to the time during which it may be contested, as to the need for a decree of nullity, as to the effect of a decree annulling a voidable marriage in *changing* status, compared with that of merely *declaring* status in the case of a void marriage and as to the effect of the marriage on the domicil of the wife or that of a decree on settled property. Without pursuing these and other possible grounds of distinction, it is worthy of note that the Court of Appeal in *De Reneville's Case* emphasised one important distinction which, though expressed by Dicey (*g*), was far from

(*d*) (1861), 9 H. L. C. 193.
(*e*) Marriage Law, 1946, s. 19.
(*f*) *Id.*, s. 32.
(*g*) *Conflict of Laws*, 5th ed., p. 295: "Where a marriage has never validly subsisted (*e.g.*, because the parties both lacked the capacity to marry or the apparent marriage was bigamous), the parties to it are in no wise bound by it and a declaration is not necessary to free them from the legal relationship as that does not exist".

representing unanimous opinion on the point (*h*). "So far as English law is concerned", observed Lord Greene, M.R. (*i*), approving the judgment of Bateson, J., in *Inverclyde* v. *Inverclyde* (*k*), "there is a clear distinction between void and voidable marriages. . . . A void marriage is one that will be regarded by every Court in any case in which the existence of the marriage is in issue as never having taken place and can be so treated by both parties to it without the necessity of any decree annulling it; a voidable marriage is one that will be regarded by every Court as a valid subsisting marriage until a decree annulling it has been pronounced by a Court of competent jurisdiction" (*l*). A common difficulty in practice is to know whether or not to advise a client who alleges his or her marriage is void to go to the expense of a suit for declaration of nullity. The distinction which the Court has now drawn should reassure the practitioner and result in a decrease in the number of unnecessary petitions for nullity of void marriages. Only in cases of doubt as to the validity or invalidity of a marriage would it appear necessary to obtain a judicial decree. In the remaining cases the client's protection lies in a full disclosure of the facts on any attempted re-marriage, and an order of mandamus calling upon any registrar or other marriage officer who refuses to perform a marriage ceremony, to show cause why he so refuses (*m*). But if the Court has simplified the issue in one direction, it has complicated it in another; for according to its judgment, as noted above, one must refer to the law governing the essentials to determine the effect of causes which, in English law, would render a marriage voidable. If, by the appropriate foreign law, such causes rendered a marriage absolutely void in the English sense expressed in the words of the Master of the Rolls cited above, then the marriage may be treated as void and no decree will be required to make it so. It should, however, be observed that the effect of a cause of annulment under its foreign proper law can only be accepted by the English Court if it can be brought within the sense of rendering a marriage voidable or absolutely void in the manner stated by the Court (*n*). Lord Greene, M.R., expressed this qualification in these terms (*o*), ". . . it would be for the English Court, after hearing evidence of French law, to decide whether in French law the marriage was void or voidable, not merely in a verbal sense, but in the sense of the words as understood in this country, that is, as indicating or not indicating, as the case might be, that the marriage would be regarded in France as a nullity without the necessity of a decree annulling it". While this process of bringing concepts of foreign law into the English categories with which English Courts are designed to deal, is entirely within the English judicial

(*h*) Professor Cheshire and Dr. Wolff disagreed with Dicey's view.

(*i*) [1948] 1 All E. R. at pp. 59–60.

(*k*) [1931] P. 29; 100 L. J. P. 16.

(*l*) For other illustrations of the effect of the distinction between void and voidable marriages the Court referred to *Adams* v. *Adams*, [1941] 1 K. B. 536; 110 L. J. K. B. 241; *Dodworth* v. *Dale*, [1936] 2 K. B. 503; 105 L. J. K. B. 586; and *Fowke* v. *Fowke*, [1938] Ch. 774; 107 L. J. Ch. 350.

(*m*) See *R.* v. *Superintendent Registrar of Marriages for Hammersmith, ex p. Mir-Anwaruddin*, [1917] 1 K. B. 634.

(*n*) Accordingly it is considered that the judicial reasoning in this decision gives little, if any, support to a theory of secondary classification.

(*o*) [1948] 1 All E. R. at p. 62.

tradition (*p*), it may, in the exceptional case, fall short of a complete application of the principle of reference of the legal effect of any particular ground of annulment to its appropriate foreign law. Under present German law, for example, " No one can assert that a marriage is void so long as the marriage has not been declared void by a decision of the Court " (*q*). It might appear to be a reasonable deduction to assume that all German marriages, whether void or voidable under German law, would be regarded on the reasoning of the Court of Appeal as voidable only in England. But on a narrower interpretation of *De Reneville* v. *De Reneville* such a deduction is far wider than the facts of that case justify. The Court was dealing only with those causes which in English law render a marriage voidable. Whether the same causes will be recognised as rendering a foreign marriage void or voidable depends on whether the legal effect under the foreign law falls generally within the English concepts of complete nullity or voidability. The only authority for extending the principle to causes which in English law render a marriage void, *e.g.*, bigamy, is the uncertain one of logical extension.

4. Does the Wife Acquire the Domicil of her Husband if Their Marriage is Defective?

Much of counsels' argument in *De Reneville's Case* was directed to the question of domicil of the wife as a basis of jurisdiction of English Courts. The exposition by the Court of the law on the question of the effect on a woman's pre-marital domicil of a defective marriage is to be welcomed as settling a point on which some uncertainty existed. The present law may be summarised as follows :—

(a) *Voidable marriages.* Such a marriage confers on the wife the domicil of her husband by operation of law. During the continuance of the marriage she has no power to resume her domicil of origin or to acquire an independent domicil of choice. The mere institution of nullity proceedings cannot entitle her to resume proleptically for purposes of jurisdiction her pre-marital domicil. Not only does she retain her husband's domicil until a decree of annulment is pronounced : the legally retrospective effect of such a decree does not extend to domicil, so that, even after decree, the wife will have had her husband's domicil so long as the voidable marriage in fact existed. The effect of a decree of annulment is to give the wife the liberty to acquire an independent domicil of choice or to resume her domicil of origin. Until she takes steps to do one or the other, she will retain her marriage domicil (*r*).

(b) *Void marriages.* If a marriage is void the wife cannot by operation of law acquire the domicil of the husband, since no legal basis exists on which domicil by operation of law can operate. But the wife may, and usually does, acquire the same domicil as her husband, as an independent domicil of choice, by living with him in the country of his domicil with the intention of so continuing. But " she was free to acquire it or not as she chose, and, if she acquired it, to abandon it or change it for a different domicil of choice " (*s*). The Court held

(*p*) See, for example, *The Colorado*, [1923] P. 102.
(*q*) Marriage Law of 1946, s. 23.
(*r*) See judgment of Lord Greene, M.R., [1948] 1 All E. R. at p. 60.
(*s*) *Per* Lord Greene, M.R., *loc. cit.*

on the facts that if the French marriage was void, the wife would have resumed her English domicil.

The importance of domicil in nullity proceedings, if one may be forgiven for stressing a familiar fact, lies in the question of whether the English Court has jurisdiction to pronounce a decree of nullity. An important distinction on this question was indicated by the Court as between allegedly void and voidable marriages. In the case of a petition alleging a void marriage the fact that a woman has an English domicil "can be established in the nullity proceedings themselves, as she attempted to establish it here, on a preliminary issue, whereas if all she could show was a voidable marriage, the trial of a preliminary issue could only result in a finding that at the date of the presentation of the petition she was domiciled in France" (*t*).

In either event the apparent *circulus inextricabilis* may be broken by the acceptance by the English Court of the trial of jurisdiction as a preliminary issue. In support of the exercise of jurisdiction on the basis of the wife's domicil where a void marriage is alleged, the Court cited with approval part of the judgment of Bucknill, J. (as he then was) in *White* v. *White* (*u*) (save as regards the reference to residence, which the Court of Appeal considered unnecessary), in which he held ". . . it seems to me just to the petitioner, and also in the public interest, that the petitioner, being domiciled and resident in this country, should have her status as a single or as a married woman judicially established by this Court".

5. Have the English Courts Jurisdiction if the Marriage is Void?

The parties in *De Reneville's Case* had, not surprisingly, adduced no evidence of the legal effect under French law of the grounds alleged for annulment of marriage. The need for such evidence had not been suggested either in the hearing of the case before Jones, J., at first instance, or, indeed, in any previous decision, other than *Robert* v. *Robert* (*a*), in which a marriage was alleged to be voidable on one or more of the five grounds of voidability in English law. In the absence of such evidence the Court of Appeal was not prepared simply to proceed on the assumption that French law was the same as English, but dealt with the two possibilities of the marriage being either void or voidable on the grounds alleged. In so far as the Court could have followed simply the principle long established of identifying the foreign and English law in this case (*b*), it is arguable that its views expressed on the hypothesis of a void marriage are merely dicta. One could wish that this possibility did not exist, for the judgments went far towards clarifying the bases of jurisdiction in both void and voidable marriages.

The following propositions as to jurisdiction over void marriages may be adduced from the judgments of Lord Greene, M.R., and Bucknill, L.J.

(*t*) *Id.*

(*u*) [1937] P. 111; 106 L. J. P. 49.

(*a*) [1947] P. 164, overruled by the Court in *De Reneville* v. *De Reneville*, [1948] 1 All E. R. 56.

(*b*) This principle was accepted by Bucknill, L.J., [1948] 1 All E. R. at p. 65.

(a) The Courts of the country in which both parties are domiciled have jurisdiction, wherever the marriage was celebrated (*c*).

(b) The Courts of the country in which the petitioner is domiciled have jurisdiction (*d*). This jurisdiction is based on the duty of the English Court " to declare the status of a domiciled Englishwoman ", and is not affected by the place where the marriage was celebrated (*e*), or whether the respondent does or does not submit to or protest against the jurisdiction.

(c) The Master of the Rolls was not prepared to consider whether the Courts of the country in which the marriage was celebrated would have jurisdiction, since the question did not arise on the facts. English law already provides an affirmative answer in *Simonin* v. *Mallac* (*f*), which the general observations of Bucknill, L.J. (*g*) do not, it is submitted, invalidate.

(d) Without giving an opinion on the question of whether the residence of both parties was sufficient to confer jurisdiction, a matter left open by the House of Lords in the *Salvesen Case* (*h*), the Master of the Rolls was prepared to assume that such was the case. No reference was made by the Court to the statutory confirmation of the residential basis of jurisdiction of the former ecclesiastical courts (*i*).

(e) The residence of the petitioner alone is insufficient to confer jurisdiction. Such jurisdiction has long rested on the inadequate and possibly inaccurate report of the decision in an undefended case, *Roberts* v. *Brennan* (*k*), which the Court of Appeal disapproved.

6. Have the English Courts Jurisdiction if the Marriage is Voidable?

That part of the judgment in *De Reneville* v. *De Reneville* which proceeded on the hypothesis that the marriage in that case was, if anything, voidable is considered to be far stronger than the conclusions based on the hypothesis of a void marriage, for it only needed the application of the principle of assuming a foreign law to be the same as English to convert the hypothesis of a voidable marriage into a fact. The bases on which the Court of Appeal would uphold jurisdiction to annul a voidable marriage may be summarised as follows :—

(a) The Courts of the country in which both parties are domiciled have jurisdiction, wherever the marriage was celebrated. Lord Greene, M.R. (*l*), regarded this proposition as " set beyond a doubt " by the decision of the House of Lords in *Salvesen* v. *Administrator of Austrian Property* (*m*). As, however, the *Salvesen Case* was dealing with a void, not a voidable, marriage, it would seem preferable to support

(*c*) Citing *Salvesen* v. *Administrator of Austrian Property*, [1927] A. C. 641; 96 L. J. P. C. 105.
(*d*) Citing *White* v. *White*, [1937] P. 111; 106 L. J. P. 49, but disapproving the reference in that case to jurisdiction based on the petitioner's residence.
(*e*) *White* v. *White* (above).
(*f*) (1860), 29 L. J. (N.S.) P. 97.
(*g*) [1948] 1 All E. R. at p. 66.
(*h*) [1927] A. C. 641.
(*i*) Judicature Act, 1925, s. 32.
(*k*) [1902] P. 143; 71 L. J. P. 74.
(*l*) [1948] 1 All E. R. at p. 61.
(*m*) [1927] A. C. 641.

this basis of jurisdiction on the decision in *Inverclyde* v. *Inverclyde* (*n*), which was approved by the Court in *De Reneville's Case*.

(b) If the marriage is voidable the parties cannot, on the reasoning of the Court, have different domicils before a decree of annulment is pronounced, and accordingly the question of jurisdiction based on the domicil of the petitioner alone would apparently not arise. But whether or not this possibility exists depends on whether the English Court would adhere strictly to the English principle of the unity of domicil of husband and wife, even in those cases in which a foreign law under which the parties originally had a common domicil during their marriage allows the wife, under certain circumstances and for certain purposes, to acquire a domicil of her own. Paragraph 28 of the American *Restatement of the Conflict of Laws* states the following proposition, "If a wife lives apart from her husband without being guilty of desertion according to the law of the State which was their domicil at the time of separation, she can have a separate domicil"; and in such a case, the Courts of the State in which one of the parties alone was domiciled would, under certain circumstances, have jurisdiction in divorce or nullity (*o*). Instances, which these provisions readily suggest, may arise on petitions before the English Courts, and would involve a conflict of two principles. On the one hand is the principle that the nature and characteristics of domicil are determined exclusively by the English definition of the concept (*p*), and on the other, the general principle of recognition of the incidents of the status of marriage conferred by the law of the parties' common domicil after marriage, together with the corollary principle of universality in giving effect to the incidents of a foreign status unless contrary to English statute law or public policy (*q*). The general tendency of the Court of Appeal in the case under consideration was to refer to what it called the matrimonial domicil (*r*) at least one question, that of the legal effect of what in English law would be grounds for holding a marriage voidable. By the same token it may be considered equally reasonable to refer to the same law the question of whether the parties have capacity to acquire separate domicils during their marriage. In cases where they have such capacity and the wife has duly acquired a separate domicil in England, it is at least arguable, despite the decisions of the House of Lords in *Lord Advocate* v. *Jaffrey* (*s*) and *Att.-Gen. for Alberta* v. *Cook* (*t*), neither of which dealt with the facts envisaged in this situation, that the English Court could properly entertain jurisdiction in nullity of marriage.

(c) The Court gave no opinion on the question of whether the residence of both parties in England at the institution of proceedings would confer nullity jurisdiction on the Courts. The fact, however, that the Court cited, without apparent disapproval, the decision of Pilcher, J., in *Hutter* v. *Hutter* (*u*) gives some indication of its

(*n*) [1931] P. 29; 100 L. J. P. 16.
(*o*) *Restatement of the Conflict of Laws*, paras. 113 and 115.
(*p*) *Shaw* v. *Gould* (1865), L. R. 3 H. L. 55; *Re Annesley*, [1926] Ch. 692.
(*q*) *Re Luck*, [1940] 1 Ch. 864; *Baindail* v. *Baindail*, [1946] P. 122.
(*r*) See Cheshire, *Private International Law*, 3rd ed., pp. 272 ff.; XX Journal of Comp. Leg. (1938), pp. 55 ff.
(*s*) [1921] 1 A. C. 146.
(*t*) [1926] A. C. 444.
(*u*) [1944] P. 95; 113 L. J. P. 78.

approval of this basis of jurisdiction. In that case the husband, domiciled in an American State, petitioned in England for annulment of a marriage celebrated in England, on the ground of the wife's wilful refusal to consummate. Both parties were resident in England, and it was partly on this basis of common residence that jurisdiction was exercised. Although the case was undefended, it was argued with great skill on behalf of the King's Proctor by Sir Donald Somervell (as he then was), the Attorney-General, but no support for the basis of jurisdiction adopted in that case can be found in the judgment of Lord Justice Somervell in *De Reneville* v. *De Reneville*. Of far greater significance in this connection is the Court of Appeal's approval of *Inverclyde* v. *Inverclyde* (*a*) in which, it will be recalled, Bateson, J., refused to exercise jurisdiction over a marriage voidable on the grounds of impotence, when the parties were domiciled in Scotland, the wife was resident in England and the husband had residences both in Scotland and England.

Faced with this apparent ambiguity of authority, we must look back for a moment to the development of these alternative bases of nullity jurisdiction, for it is here that statute has perpetuated principles of jurisdiction essentially local in character which stretch back, side by side with the common law, to the late Middle Ages. Just as common law jurisdiction was founded largely on the county, that of Ecclesiastical Courts was founded on the diocese. This spiritual jurisdiction depended on the residence of the respondent within the diocese of the Court before which he was summoned, and its basis was confirmed by the Statute of Citations, 1531 (*b*). Residence was the single and simple test for all causes heard before those Courts. The nationality of the parties and the place of celebration of the marriage were alike immaterial, for jurisdiction was based on the fact that the bishop was responsible for the moral and spiritual welfare of all members of his diocesan flock. Domicil in its technical sense was irrelevant, because in the formative period of ecclesiastical jurisdiction it was an unknown conception, in the latest period, the century before 1857, its nature, characteristics and functions were being gradually worked out, and only at the end of the nineteenth century were the fetters of ecclesiastical analogy shaken from jurisdiction in divorce, and domicil established as the exclusive foundation of jurisdiction to dissolve a valid marriage (*c*). The expanding function of domicil in the last century in matters of domestic status was caused by the need for the establishment of some test of personal law to solve problems of the conflict of laws which were increasing in both numbers and variety. The choice lay between domicil and nationality, and we chose domicil because it accorded more closely with the individual spirit of the common law than did nationality: it was the English solution to the conflict of political theories that the individual existed for the nation, or the law existed to serve and protect the

(*a*) (1931), 100 L. J. P. 16.

(*b*) "No manner of person shall be from henceforth cited or summoned . . . to appear before any . . . judge spiritual out of the diocese or peculiar jurisdiction where the person . . . shall be inhabiting and dwelling at the time of awarding or giving forth of the same citation or summons." Cited by Pilcher, J., *Hutter* v. *Hutter*, [1944] 2 All E. R. 368, 370.

(*c*) *Le Mesurier* v. *Le Mesurier*, [1895] A. C. 517.

individual. In the particular field of nullity of marriage Judges began to realise the illogical nature of the difference in the bases of jurisdiction between divorce, and nullity of purely voidable marriages; they began to realise that these two matrimonial causes had, perhaps, more in common than the common remedy of nullity which was, for historical reasons, applied to two very different types of marriage. This realisation is most clearly expressed by Bateson, J., in what still remains an outstanding judgment on the annulment of a *voidable* marriage (*d*). There he said (*e*), "The marriage being voidable and not void, and the decree affecting and involving an alteration of status, and being a judgment *in rem* binding on all the world, there can be no jurisdiction in this Court unless the parties are domiciled in this country. It seems to me, that if the principle is sound, that in a suit for dissolution of marriage in divorce jurisdiction depends on domicil, it must equally so depend in a suit for dissolution of marriage on the ground of impotence. To call it a suit for nullity does not alter its essential and real character of a suit for dissolution". While the views expressed in the last sentence were very properly questioned by Pilcher, J. (*f*), it is submitted that the main argument of Bateson, J., is unimpeachable. It was applied in 1930, after distinguished argument on both sides, to the only ground on which a marriage was then voidable, that of impotence. But the reasoning is equally valid for the four new grounds which render a marriage voidable since 1937 (*g*). For in all five cases the Court is called upon to destroy an existing status. The interest of society, which lies behind the granting and supervision of any status, and particularly that of marriage, is secured by the universally recognised exclusiveness of the Courts of the parties' personal law to grant the only effective judgment *in rem* on domestic status; and throughout common law systems that personal law, the basis of jurisdiction, is domicil.

It has been suggested (*h*) that, since the decision in *Hutter* v. *Hutter* (*i*), *Inverclyde* v. *Inverclyde* (*k*) is not completely good law. If this is so, how has it come about? In *White* v. *White* (*l*) Bucknill, J., observed that *Inverclyde* v. *Inverclyde* (*k*) did not cover the case with which he had to deal, one of a bigamous marriage, and in support cited Bateson, J.'s, remark, "In truth bigamy cases help very little, as in them as distinct from this there never has been a marriage, and the argument that there is no distinction or difference between the two classes of cases seems to me untenable" (*m*).

In *Fowke* v. *Fowke* (*n*), a case on the enforcement of the terms of a separation agreement after a decree of nullity had been granted, Farwell, J., employed distinctions between various kinds of marriages completely in accord with the views expressed by Bateson, J.

(*d*) *Inverclyde* v. *Inverclyde* (1931), 100 L. J. P. 16: cf. *Salvesen* v. *Administrator of Austrian Property*, [1927] A. C. 641, which dealt with a *void* marriage.
(*e*) 100 L. J. P. 16 at p. 20.
(*f*) *Hutter* v. *Hutter*, [1944] 2 All E. R. 368 at p. 372.
(*g*) Matrimonial Causes Act, 1937, s. 7.
(*h*) Latey, *Divorce*, 13th ed., p. 56; Wolff, *Private International Law*, p. 618; *contra*, Schmitthoff, *Conflict of Laws*, p. 320.
(*i*) Above.
(*k*) (1931), 100 L. J. P. 16.
(*l*) [1937] 1 All E. R. 708 at p. 711.
(*m*) (1931), 100 L. J. P. 16 at p. 23.
(*n*) [1938] 2 All E. R. 638.

Farwell, J.'s, decision was approved and followed by the Court of Appeal in *Adams* v. *Adams* (*o*), where a distinction was clearly drawn between the nature and legal effects of a void and a voidable marriage. The first note of disapproval of the decision in *Inverclyde* v. *Inverclyde* (*p*) was sounded by Hodson, J., in *Easterbrook* v. *Easterbrook* (*q*), in which the learned Judge was unable " . . . with all respect to Bateson, J., to see the distinction, for the purpose of jurisdiction, which appears to have been drawn in the *Inverclyde Case*, between voidable and void marriages ". On a petition for nullity of marriage because of wilful refusal to consummate, Hodson, J., granted a decree on the ground that both parties were resident, and the marriage was celebrated, in England. A summary of the differences between this and the *Inverclyde Case* provides a convincing argument as to which decision is the stronger. *Easterbrook* v. *Easterbrook* dealt with a war marriage between a Canadian soldier (the petitioner) domiciled in Canada and an English girl domiciled in England. Both parties were resident in England when proceedings were instituted, and the respondent wife was apparently considered to be domiciled here (though how she could be is not easy to see). The petition was undefended, the case was not argued, and Hodson, J., delivering a very short judgment, followed the decision in *White* v. *White* mentioned above, a case of a marriage void for bigamy. The distinction drawn by the Court of Appeal, particularly by Scott, L.J., in *Adams* v. *Adams* (*r*), was not brought to the Court's attention.

For these reasons it is submitted that *Easterbrook* v. *Easterbrook* is a decision which leaves the *Inverclyde Case* intact. Of far greater significance is Pilcher, J.'s, decision in *Hutter* v. *Hutter* (*s*). In a careful judgment the learned Judge granted a decree of nullity, supporting his conclusions with reasoning on these lines: (a) the Judicature Act, 1925, s. 32, providing that " . . . where no special provision is contained in this Act, or in rules of court with reference thereto, any such jurisdiction shall be exercised as nearly as may be in the same manner as that in which it might have been exercised by the court to which it formerly appertained " obliged him to base jurisdiction on the ground of residence, whether the marriage was void or voidable (*t*). (b) " So far as I am aware the proposition that this Court has jurisdiction to inquire into and pronounce upon the validity of every marriage contracted in accordance with English law in this country has never been questioned (*u*). . . . If this were not so, it would mean that the competent court for matrimonial suits in this country renounced jurisdiction in matters which were within its own peculiar competence, namely, questions relating to the validity of a marriage contracted in England by persons who, if English, are subject as such to the laws of this country, and, if foreigners, must be taken to have subjected themselves to such laws: *Scrimshire* v. *Scrimshire* " (*a*). (c) " In my opinion, there is no justification either on

(*o*) [1941] 1 All E. R. 334 (C. A.).
(*p*) Above.
(*q*) [1944] 1 All E. R. 90.
(*r*) [1941] 1 All E. R. 334 at pp. 337–8.
(*s*) [1944] 2 All E. R. 368.
(*t*) *Id.*, at p. 370.
(*u*) *Id.*, at p. 371.
(*a*) *Id.*, at p. 372. *Scrimshire* v. *Scrimshire* (1752), 2 Hag. Con. 395.

principle or on authority for the drawing of such a distinction" (Bateson, J.'s, distinction between void and voidable marriages). "Inasmuch as practical questions of status are involved in the declaration of any court which pronounces upon the validity of a marriage the court of the domicil of the parties has no doubt a peculiar competence to adjudicate in such suits. The authorities to which I have referred make it clear, however, that the courts of this country have not regarded the court of the domicil of the parties as having exclusive competence to pronounce upon the validity of a marriage, more particularly where such marriage has, as in this case now before me, been celebrated in this country" (*b*). Let us look at these *rationes decidendi* one by one. (a) Section 32 of the Judicature Act, 1925, directing the Court to observe and follow "as nearly as may be" the old ecclesiastical jurisdiction, in itself clearly justifies a Court to-day in exercising nullity jurisdiction on the basis of residence of the parties in England. But the terminology of the section is sufficiently wide to enable a Court, if it wishes, to interpret the section in the light of legal development and social changes which have occurred since 1857. A liberal interpretation of this nature represents, in effect, the means which have assisted towards the end of what Pound has called "the progressive sociological interpretation of precedent" and, in this case, of statute; and contributed towards putting voidable marriages into their proper jurisdictional perspective. For the calm of the old Ecclesiastical Courts was unruffled in matters of nullity of marriage by any international conflict of jurisdiction. It is not to be expected that such matters should escape that conflict when transferred to a secular Court administering English law in its widest sense. For while it lies within the power of English law to ordain that any kind of marriage shall be annulled on any basis of jurisdiction it chooses to adopt, it is beyond its power to ensure that the decrees of its Courts shall be recognised outside England unless, in matters involving a change of domestic status, jurisdiction is based on the exclusive and universal principle of the personal law, which for England means that of the domicil of the parties. Only on such a principle can judgments on the status of marriage become judgments *in rem*. (b) The second proposition of Pilcher, J., would not, apparently, include *Inverclyde* v. *Inverclyde* (*c*), where the Court refused to exercise jurisdiction to annul a marriage celebrated in England in English form. (c) In rejecting the distinction made by Bateson, J., between void and voidable marriages Pilcher, J., was also unwittingly rejecting the same distinction drawn by the Court of Appeal in *Adams* v. *Adams* (*d*) for, amidst a welter of cases referred to, that decision does not appear. The distinction, therefore, remained as valid as ever, even before the most recent approval of *Inverclyde's Case* by the Court of Appeal (*e*).

Such was the state of the law relating to the annulment of voidable marriages in May, 1947, when *Robert* v. *Robert* (*f*) and *De Reneville's Case* came before the Court. In the second of these cases Jones, J.,

(*b*) *Id.*, at p. 374.
(*c*) Above.
(*d*) [1941] 1 All E. R. 334.
(*e*) *De Reneville* v. *De Reneville*, [1948] 1 All E. R. 56.
(*f*) [1947] 2 All E. R. 22.

has done much to dispel the doubts which, in the past ten years, have been cast upon the decision in *Inverclyde* v. *Inverclyde*. He has in fact logically extended the principle in that case from impotence to wilful refusal to consummate a marriage. Behind the distinction between void and voidable marriages there now stands the authority of decisions of the Court of Appeal (*g*) and several of Courts of first instance (*h*). One may with reason hope that this distinction, with all that it implies in matters of domicil, status and jurisdiction, will not again be seriously questioned.

To sum up this somewhat discursive review of the residence of both parties as a basis of jurisdiction over voidable marriages, one may say that jurisdiction may perhaps still be exercised on this basis, though on principle and on the balance of authorities, such jurisdiction could far more properly be exercised solely on the basis of domicil.

(d) The Court expressed a definite opinion that the residence of the petitioner alone within the jurisdiction was insufficient to give English Courts the power to annul a voidable marriage. Lord Greene, M.R., observed, " That a wife who is resident but, *ex hypothesi*, not domiciled here can compel her husband who is both domiciled and resident abroad to come to this country and submit the question of his status to the Courts of this country appears to me to be contrary both to principle and convenience " (*i*). Bucknill, L.J., made the case for rejecting jurisdiction even stronger in denying that under such circumstances even the wife's domicil in England before her marriage could assist in conferring jurisdiction on the Court (*k*).

7. Does the Fact that a Petition is Undefended Extend the Jurisdiction of the English Courts?

In respect of jurisdiction in nullity over voidable marriages there has been developing in recent years, almost as if by chance, an unspoken and unsatisfactory line of distinction on the basis of whether or not a petition has been defended. This distinction has been far more marked in cases of voidable than of void marriages, since the former involve more difficulty in proof of grounds of jurisdiction. Connected with this same general distinction is that of the effect, if any, to be given to the voluntary submission to the jurisdiction of a respondent domiciled or resident abroad. The alleged distinction may be formulated as follows : the English Court will adhere strictly to the principle that jurisdiction in the annulment of voidable marriages is based exclusively upon domicil whenever a petition based on some other ground is defended (*l*), but may exercise jurisdiction on such other ground if the respondent does not object (*m*). This inchoate distinction received indirect support from the judgment of Bucknill, J. (as he then was)

(*g*) *Adams* v. *Adams*, [1941] 1 All E. R. 334; *De Reneville* v. *De Reneville*, [1948] 1 All E. R. 56.

(*h*) *Inverclyde* v. *Inverclyde* (1931), 100 L. J. P. 16; *Fowke* v. *Fowke*, [1938] 2 All E. R. 638; *De Reneville* v. *De Reneville*, [1947] 2 All E. R. 112.

(*i*) [1948] 1 All E. R. 63.

(*k*) *Id.* at p. 66.

(*l*) *Inverclyde* v. *Inverclyde*, [1931] P. 29; *De Reneville* v. *De Reneville*, [1947] 2 All E. R. 112.

(*m*) *Easterbrook* v. *Easterbrook*, [1944] P. 10; *Hutter* v. *Hutter*, [1944] P. 95.

in *White* v. *White* (*n*). In so far as the distinction existed, it was apparently made from the analogy of voluntary submission in normal actions *in personam*, and ignored the vital principle that submission or non-appearance of the respondent cannot justify a Court other than that of the domicil of the parties in exercising jurisdiction to change domestic status. For in matters of status the concern of the country of the parties' personal law is no less than that of the parties themselves. It is to be hoped that the Court of Appeal has now strangled this unwanted child before it has grown too strong. Lord Greene, M.R., remarking on the importance attached by Bucknill, J., to the fact that the respondent in *White* v. *White* (*n*) had not objected to the jurisdiction, made this observation (*o*): "With great respect I cannot agree with this. In the case before him the English domicil of the petitioner did, in my opinion, give the Court jurisdiction whether or not the respondent objected. Moreover, I should have thought that, on principle, the exercise of jurisdiction in matrimonial causes affecting status could not depend on the submission of the respondent or his refusal to submit to the jurisdiction". Just as a husband's submission could not confer jurisdiction where such did not otherwise exist, so his protest to the jurisdiction would be ineffective where the Court was properly seised of a case in any event, as in the case of a void marriage if jurisdiction were based on the wife's independent domicil (*p*).

EASEMENTS, RIGHTS AND PRIVILEGES

By J. F. GARNER, LL.M., Solicitor of the Supreme Court

In section 1 (1) of the Law of Property Act, 1925 (*a*), it is provided that an "easement, right or privilege in or over land", for an interest equivalent to an estate in fee simple absolute in possession or a term of years absolute, is capable of taking effect as a legal interest; this means in effect that, if acquired by deed or prescription, such interests will normally be legal. All estates, interests and charges in or over land other than the above and the other rights, etc., specifically mentioned in the same section, take effect as equitable interests (section 1 (3)). Moreover, under section 10 (1) of the Land Charges Act, 1925, "any easement, right or privilege over or affecting land . . . and being merely an equitable interest" is to be a Class D (iii) land charge, and will therefore be void as against a purchaser of the legal estate for value, unless it is registered under the provisions of the Act (*b*). In section 205 (1) (ix) of the L. P. A., "land" is said to include for the purposes of the Act, "an easement, right, privilege or benefit in, over or derived from land" (*c*). Conveyances (which

(*n*) [1937] P. 111.
(*o*) *De Reneville* v. *De Reneville*, [1948] 1 All E. R. at p. 61.
(*p*) *White* v. *White*, [1937] P. 111.
(*a*) Hereinafter referred to as "L. P. A."
(*b*) If authority is required for this elementary proposition, see now *Sharp* v. *Coates*, [1948] 1 All E. R. 136.
(*c*) Compare Settled Land Act, 1925, s. 117 (1) (ix); Trustee Act, 1925, s. 68 (6); and Registered Land Act, 1925, s. 3 (viii).

term includes any assurance of property other than by will: L. P. A., section 205 (1) (ii)) of easements, etc., must therefore be made by deed if they are to convey or create the legal interest therein (*d*). Moreover, where an easement, right or privilege is created for a legal estate, it must enure for the benefit of the land to which it is intended to be annexed (L. P. A., section 187 (1)) (*e*). Special provisions are applicable to easements, rights and privileges in the case of registered land, and these matters are considered later in this article.

It is important, therefore, that a practitioner should know exactly what rights the law regards as being covered by the term "easements, rights and privileges [and benefits] in or over land", for the purposes of the above provisions. It is here proposed to consider these juristic concepts *seriatim*, with the primary objective of compiling a reasonably comprehensive list of interests capable of subsisting at law under L. P. A., section 1 (2) (a), and of endeavouring to explain the meanings of these terms in the other contexts in the 1925 property legislation.

By way of introduction, it seems that the phrase must be read so as to exclude estates in land under section 1 (1) L. P. A., and equitable interests in the nature of estates. The words under discussion are intended to cover those interests in land which "restrict the enjoyment of estates by enabling other persons to have rights over the land, but do not constitute any right ever to acquire possession of the land, either immediately or at a future time" (*f*). These interests, it is submitted, are not confined to the servitudes known to English law. A servitude, a term native to the civil law, has been defined as being "a real right, constituted for the exclusive advantage of a definite person or definite piece of land, by means of which single discretionary rights of user in the property of another belong to the person entitled" (*g*). The only servitudes known to English law are, however, easements and profits *à prendre*. Easements are expressly named in the phrase under discussion; profits would appear to have been intended by the Legislature to be included within the term "privileges".

Easements.

The term "easement" has been held to include a number of different rights, from a right of way over neighbouring land, to a right to wash clothes in the kitchen of a neighbouring house (*h*), but it is well established that all easements must have the following common characteristics:—

(a) There must be a dominant and a servient tenement; *i.e.*, the easement cannot be held "in gross" (*i*).

(b) The dominant and servient tenements must be in separate ownership, for any right that a man claims over his own

(*d*) L. P. A., s. 52 (1).

(*e*) It is submitted, however, that where the right, etc., is *intended* to subsist in gross, this section does not prevent it from being a legal estate, but Wolstenholme and Cherry do not agree with this and are of the opinion that "a so-called easement, etc., in gross . . . so far as it creates an interest in land will only take as an equitable interest" (*Conveyancing Statutes*, 12th ed., Vol. 1, p. 549).

(*f*) Goodeve and Potter's *Modern Law of Real Property*, p. 70.

(*g*) Holland, *Jurisprudence*, 13th ed., p. 225.

(*h*) *Heywood* v. *Mallalieu* (1883), 25 Ch. D. 257.

(*i*) See, *e.g.*, *Hawkins* v. *Rutter*, [1892] 1 Q. B. 668, *per* Lord Coleridge, C.J., but the dominant tenement need not necessarily be a corporeal hereditament: *Hanbury* v. *Jenkins*, [1901] 2 Ch. 401.

land for the benefit of another parcel also belonging to him, is a natural incident of his ownership of the "servient" parcel.

(c) The easement must be such that it is capable of benefiting the dominant tenement, though this does not mean that the servient tenement must necessarily be contiguous to the dominant tenement (*k*).

(d) The easement must be capable of being the subject-matter of a deed of grant.

(e) Except in the case of a drain or watercourse, an easement cannot grant the exclusive use of land; the grantee of the exclusive use of a thing affixed to the soil (such as a gateway) is deemed to have the ownership thereof: see *Reilly* v. *Booth* (1890), 44 Ch. D. 12, and Sweet's article, "The Easement of Tunnelling" in [1916] L. Q. R. 70.

If the right possesses these constituents, it seems that it may correctly be termed an easement (*l*). There are some thirty or so different types of easements given in *Gale on Easements*, and the list is certainly not closed, but it seems that if a specific right does not comply with all the above requirements, it is not entitled to be termed an easement. Thus, in *Ackroyd* v. *Smith* (*m*), Cresswell, J., said: "It is not in the power of a vendor to create any rights not connected with the use or enjoyment of the land, and annex them to it, nor can the owner of land render it subject to a new species of burden so as to bind it in the hands of an assignee". In the well-known case of *Hill* v. *Tupper* (*n*), Pollock, C.B., said "a new species of incorporeal hereditament cannot be created by the will and pleasure of an individual owner of an estate; he must be contented to take the sort of estate and the right to dispose of it as he finds the law settled by decisions or controlled by Act of Parliament. He may grant what he pleases, but he cannot carve out the property so as to enable the grantee to bring an action against the grantor for the sort of right he claims in this case". This quotation refers, not to easements, but to incorporeal hereditaments, which have been described as "hereditaments to which applies the description *tangi non possunt nec videri*" (*o*). However, as the learned editor of Goodeve and Potter (*p*) points out, "it is sometimes said that easements are not incorporeal hereditaments, but rights appurtenant to corporeal hereditaments" (*q*). While pointing out that an easement of ancient origin may be appendant to its dominant tenement, there seems to be no doubt of the truth of this statement, for although an easement can be created by "the mere delivery of a deed", it cannot be assigned, nor will it pass by operation of law on

(*k*) *Todrick* v. *Western National*, [1934] Ch. 561, and *Re Salvin's Indenture*, [1938] 2 All E. R. 498.

(*l*) The High Court of Australia has recently recognised as a valid easement a right to "transmit noise" over the servient tenement; as the requirements above mentioned were complied with, there seems no doubt but that this decision would be followed in an English Court: *Re State Electricity Commission of Victoria and Joshua's Contract* (1940), 46 A. L. R. 105.

(*m*) (1850), 10 C. B. 164.

(*n*) (1863), 2 H. & C. 121.

(*o*) Challis, *Real Property*, 3rd ed., p. 47.

(*p*) *Modern Law of Real Property*, p. 15.

(*q*) Or incorporeal hereditaments: see note (*i*), *supra*.

death or bankruptcy, so as to be in separate ownership from its dominant tenement. This view of the nature of an easement is confirmed by the definition of land in section 205 (1) (ix) of the L. P. A., where a clear distinction is drawn between incorporeal hereditaments and easements, etc. The Lands Clauses Consolidation Act, 1845, confers powers for the acquisition of lands, including appendant or appurtenant easements, but does not enable the acquiring authority to compel a landowner to grant an easement over his land where none already existed; the authority in such a case would have to purchase the estate of the landowner outright (*r*).

The argument of *Hill* v. *Tupper* (*supra*) is none the less fully applicable to easements. On a careful examination of decided cases, it seems that all those alleged easements which have been rejected as such by the Courts, have been so rejected by reason of their infringement of one or other of the four above-named requirements. Thus :—

(a) The so-called "ius spatiandi"—the right to roam at will over another's land—is not capable of exact definition in a grant, unless it be so sweeping that possession of the land be given, in which latter case the right granted is something more than an easement (*s*).

(b) Similarly, there is no right to a "fine view", for this, as Coke said, is a "matter of delight only" (*t*) and is not capable of being exactly defined in a grant. The owner of a beautiful garden therefore cannot "prevent the adjoining owner from erecting on his land such building as he thinks fit", just because he alleges that the pleasure derived from the sight or scent of the flowers would be impaired (*u*). Lord Blackburn in *Dalton* v. *Angus* (1881), 6 App. Cas. 740, was of opinion that the difference between the right of prospect and the well-recognised right to light was "more quaint than satisfactory", and he pointed out that if a right to prospect were enforced by the Courts, it would virtually prohibit completely the building of large towns. However, in the old case of *Bathurst* v. *Burden* (1786), 2 Bro. C. C. 64, the Court restrained a tenant from building so as to interrupt his landlord's prospect, although there was no express covenant in the lease prohibiting such building. In so far as this case is still an authority, it must be read as being confined to the relationship of landlord and tenant.

(c) As there is no right to a fine view, so there is no right of privacy known to English law, except under an express contract. Thus, no action lies for breach of privacy occasioned to premises (whether more than twenty years old or not) by the opening of windows in a neighbouring house, or a public road over neighbouring lands (*a*).

(d) The exclusive right to ply for hire with boats on a canal was

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(*r*) *G. W. R.* v. *Swindon, etc., Ry.* (1883), 9 App. Cas. 787. In modern statutes express powers to compel the creation of easements are frequently given, so as to avoid this difficulty: see, *e.g.*, Electricity Act, 1947, s. 9 (2.)

(*s*) *Att.-Gen.* v. *Antrobus*, [1905] 2 Ch. 198 (the "Stonehenge Case").

(*t*) *Aldred's Case* (1610), Co. Rep. 59b.

(*u*) See *Potts* v. *Smith* (1868), L. R. 6 Eq. 311; this case has been cited as establishing the principle that an easement of such a nature is not recognised by the law. Actually the case seems only to be authority for the proposition that such action does not amount to a breach of a covenant for quiet enjoyment given by a lessor to his lessee.

(*a*) *Tapling* v. *Jones* (1865), 11 H. L. C. 305; *Turner* v. *Spooner* (1861), 1 Dr. & Sm. 467.

clearly not an easement, for there was no dominant tenement capable of benefiting from such a novel right (*b*).

(c) Rights belonging to a "fluctuating class" of persons such as the inhabitants of a particular village, have frequently been held not to be capable of subsisting as easements, for such rights are not capable of being the subject-matter of a grant.

(f) A right to air through a defined channel is well recognised as the possible subject of an easement (*c*), but the passage of air through an undefined channel is not so recognised. As was said by Bowen, L.J., in a case where the passage of air was claimed for the benefit of the plaintiff's windmill, "the passage of undefined air gives rise to no rights and can give rise to no rights for the best of all reasons—that of common sense, for you cannot acquire any rights against others by a user which they cannot interrupt" (*d*). A reservation of percolating water (through an undefined channel) on the sale of a part of the land will not be recognised as an easement, but the right to obtain water from the servient tenement is capable of being an easement (*e*).

Privileges.

It is proposed to deal next with privileges, for these, in so far as the term is capable of exact definition, seem to have a more restricted meaning than "rights", considered hereafter.

"Privilege" is not a normal term of the conveyancer's art, and most of the text-books on the law of real property reveal no reference to the term in their respective indices. The word is not defined in the L. P. A., or in the Interpretation Act, 1889, but "Termes de la Ley" says that privileges are "liberties and franchises granted to an office, place, town or mannor, by the King's great charter, letters patents, or Act of Parliament; as Toll, Sake, Socke, Infangtheefe, Outfangtheefe, Turne or Delfe and divers such like". This definition is scarcely relevant to the present context, but the term does not seem to have been frequently judicially considered. When construing a section of the Friendly Societies Acts, Esher, M.R., said in *Re Miller*, [1893] 1 Q. B. 327, that a privilege is an advantage conferred "over and above the ordinary law".

The term would appear to be wide enough to include the second class of servitudes above referred to, namely, profits *à prendre*, and certain other rights considered below.

(a) "A profit *à prendre* is a right which may be either appendant or appurtenant to a corporeal hereditament, or held in gross, to go on the land of another person and to take some profit from it, as to destroy game and keep it, to pasture cattle, or to dig and carry away minerals or to take fish in the waters of another" (*f*), but it does not include a right to take water, which is normally an easement, unless subsisting in gross (*g*). Apart from the provisions of the L. P. A., there was no doubt that a profit was an interest in land, and if it had

(*b*) *Hill* v. *Tupper* (*supra*).
(*c*) *Bass* v. *Gregory* (1890), 25 Q. B. D. 481.
(*d*) *Harris* v. *De Pinna* (1886), 33 Ch. D. 251.
(*e*) See *Re Simeon and Isle of Wight R. D. C.*, [1937] Ch. 525.
(*f*) Goodeve and Potter's *Modern Law of Real Property*, p. 182.
(*g*) *Race* v. *Ward* (1855), 4 E. & H. 702.

been created by deed it would be capable of subsisting at law (*h*); otherwise a profit would subsist only as an equitable interest. The subject-matter of the profit must be one of the "natural fruits" of the earth; in *Smart* v. *Jones* (*i*) the Court were clearly of the opinion that a right to take cinders from another's land (which had accumulated there by human agency) was not capable of taking effect as a profit *à prendre*. It is clearly a hereditament, as it may exist in gross, and is the only form of incorporeal hereditament which is subject to rating; for by virtue of the Rating Act, 1874, "rights of fowling, of shooting, of taking or killing game or rabbits and of fishing, when severed from the occupation of land" are expressly made rateable hereditaments (*k*). Profits also include the various forms of rights of common capable of being enjoyed by an individual landowner as such; for example, common of pasture, piscary, estovers and turbary, etc.

It may, however, be argued that, as the definition of land in L. P. A., s. 205 (1) (ix) includes a "rent and other incorporeal hereditaments", as well as "easements, rights and privileges", it could not have been intended by the draftsmen of the Act that a profit, being an incorporeal hereditament, should be included in the term privilege. Moreover, in section 62, L. P. A., both profits and privileges figure in the same sub-section (3), but perhaps these were inserted only *ex abundantia cautela*. A restrictive interpretation of "privilege" so as to exclude profits—and it is submitted that the term should be interpreted uniformly throughout the 1925 property legislation—leads to strange consequences. Presumably, if a profit is enjoyed by two or more persons in common, the statutory trusts of section 34, L. P. A. will apply, for the saving provisions of section 187 (2) are restricted in their operation to "an easement, right or privilege". The special provisions of the Land Registration Act, 1925, relating to easements, rights, privileges or benfiets, such as section 70 (2) and section 72 would not then be applicable to profits—a result which, it is submitted, would be clearly opposed to the intention of the draftsmen of the Act. The registered proprietor would appear not to have any power to grant in fee simple in possession a profit derived from the registered land, similar to the power given him to create an easement, right or privilege under section 18 (1) (*c*) of the same Act.

In the well-known case of *White* v. *Williams*, [1922] 1 K. B. 727, a right to depasture sheep on a "sheepwalk" in Wales, which was described as a profit *à prendre*, but which seems on the facts of the case to have been more of the nature of a common right, was held to pass under the "general words" implied in a conveyance under the Conveyancing Act, 1881, s. 6, falling within the description "privileges, easements, rights and advantages". This case is not strictly applicable to the context here considered, but it is submitted that in practice the Courts would similarly construe "privilege" so as to include a profit *à prendre*.

(*h*) *Webber* v. *Lee* (1882), 9 Q. B. D. 315.

(*i*) (1864), 15 C. B. (N.S.) 717.

(*k*) The de-rating of agricultural property under the Local Government Act, 1929, does not apply to these hereditaments: *Cleobury Mortimer R. D. C.* v. *Childe*, [1933] 2 K. B. 368.

(b) Akin to profits, but to be distinguished therefrom in the persons capable of enjoying the benefits thereof, are the various rights which may be acquired by fluctuating classes of persons by virtue of immemorial usage, and in respect of a certain locality. Such rights are based on custom, and it is therefore unnecessary to presume a grant by way of explaining their origin. Moreover, unlike easements and profits, these rights will not be recognised and enforced by the Courts if they can be proved to be unreasonable (*l*).

(c) Holland (*m*) uses the term "privilege" in the sense of a security coupled with possession, but this is a Continental conception, and the word has never been used in this sense in English land law. In any event, the interest of a mortgagee in possession, if in respect of a legal mortgage, would be a legal estate, by virtue of L. P. A., section 1 (1), and an equitable mortgagee has no right as such to possession of the property (*n*). Moreover, as Holland himself points out, the special privilege of a mortgagee in possession, as distinct from the position of a prior mortgagee without possession, is not now of great value as most modern systems of law recognise the need for registration according to which each charge takes priority only in accordance with the date of registration thereof.

Rights.

The word "right" has been used by various writers as referring to practically any juristic concept, and as the term has never been given an exact definition in English law, it is most difficult to say what exactly the Legislature intended to be included in the term. The term could obviously be read to include the incidents of the ownership of the fee simple or some lesser estate in the land, which are sometimes referred to as "natural rights" (*o*), but in the section under discussion the reference seems to be to rights owned by some person other than the legal estate owner in or over the particular piece of land. The interpretation of the term must be confined to rights *in rem* recognised by law (*p*) and it is now proposed to consider possible candidates for inclusion in this category.

(a) It is suggested by Goodeve and Potter (*q*) that tenancies at will and at sufferance are legal interests within this expression. Before the 1925 legislation these interests were regarded as being legal interests—in fact they may be said to be creatures of the common law—and being analogous to terms for portions of a year, it is submitted that the contention is clearly well founded.

(b) The term will also obviously include public rights, *e.g.*, to a right of way, but such rights are not normally considered as property owing to the generality of their ownership.

(*l*) *Gateward's Case* (1607), 6 Co. Rep. 59; "for that ought to be reasonable and *ex certa causa rationabili* (as Littleton saith) *usitata.*" For a modern example of a custom akin to an easement, see *Brocklebank* v. *Thompson*, [1903] 2 Ch. 344, where a right of way was held to have been acquired by custom for the benefit of parishioners proceeding to their parish church.

(*m*) *Jurisprudence*, 13th ed., p. 238.

(*n*) *Finck* v. *Tranter*, [1905] 1 K. B. 427.

(*o*) *E.g.*, *Angus* v. *Dalton* (1879), 6 App. Cas. 752.

(*p*) It is submitted that rights which would be recognised in law as legal interests in or over land, must be *in rem*, and not merely *in personam.*

(*q*) *Modern Law of Real Property*, p. 169.

(c) " Easements " in course of prescription would probably be held to come within this term (*r*). The twenty years' user that must be established for the purpose of acquisition of an easement under the Prescription Act, 1832, must be in respect of the twenty years immediately before action brought, and this means in effect that the title to an easement acquired under the Act is inchoate only, until an action is brought, when the title then becomes a complete right (*s*). The owner of the " dominant tenement " in such a case, *ex hypothesi*, cannot enforce his right against the " servient " owner while the right is still in course of prescription, but should the " dominant tenement " be severed during such period of prescription, the vendor of the part thereof will not be able to prevent the purchaser from enjoying the benefit of the inchoate easement, for such action would amount to a derogation from his own grant. Parker, J., observed in *Browne* v. *Flower* (*t*), that " if the grant or demise be made for a particular purpose, the grantor or lessor comes under an obligation not to use the land retained by him in such a way as to render the land granted or demised unfit or materially less fit for the particular purpose for which the grant or demise was made ". The rights enforceable under this principle may be of many types, and were described in the same case as being similar to restrictive covenants. Thus, in *Port* v. *Griffith* (*u*) it was held that (subject to satisfactory proof) a tenant may be able to prevent his landlord from letting an adjoining shop for a purpose which would detract from the value of the demised premises.

(d) " Quasi-easements " (*a*) *i.e.*, rights exercised by a landowner over a parcel of his own land for the benefit of another parcel cannot be included, for as stated above, these are " natural rights " incident to ownership.

(e) The *ius spatiandi* which, as was said above, cannot subsist as an easement, would also not be recognised as a right in the present sense, for it creates merely a licence giving rights *in personum* only. Similarly, a right of privacy, or to a prospect, is only known to the law by virtue of an express contract, and no rights *in rem* would be created thereby.

(f) A restrictive covenant running with the land in accordance with the doctrine in *Tulk* v. *Moxhay* (*b*) is a creature of equity, and formerly could only have created rights *in personam*. In modern law, however, " notice " has come to mean registration, and it seems, as has been argued by Dr. Hanbury, that a restrictive covenant is in reality nearer a right *in rem* than a mere right *in personam*. Arguing purely on logic, therefore, there seems to be no reason why a registered restrictive covenant should not be held to be a right within the present context, and so be capable of being a legal interest. Such a result, however, causing a paradoxical confusion of legal and equitable

(*r*) In *Barlow* v. *Ross* (1890), 24 Q. B. D. 381, " right " was held to include an inchoate easement to light in course of prescription, for the purposes of the Artisans' Dwellings Act, 1875.
(*s*) *Colls* v. *Home and Colonial Stores*, [1904] A. C. 179.
(*t*) [1911] 1 Ch. 226.
(*u*) [1938] 1 All E. R. 295.
(*a*) *Wheeldon* v. *Burrows* (1879), 12 Ch. D. 49.
(*b*) (1848), 2 Phil. 774.

interests, is contrary to the spirit of the 1925 legislation, and the argument would probably not find favour before the Courts (*c*).

(*g*) The term "right" seems wide enough in this context to include the many and various statutory rights in or over land vested in local or other public authorities (*d*). Thus, land which has been designated by the Minister of Town and Country Planning as being part of a site for a new town, may be acquired compulsorily by the town's development corporation (*e*). Land which has been designated as being subject to compulsory purchase in a development plan prepared by the local planning authority and approved by the Minister, may be acquired compulsorily (with the consent of the Minister) by the local authority (*f*) under the Town and Country Planning Act, 1947 (*g*). Under Defence Regulation 51, a competent authority, or body authorised in its behalf, may requisition property for the purpose of the statutes under which the Regulation was made (*h*). Other examples of exceptional statutory rights are discussed more fully elsewhere by the present author (*i*). Some of these rights are registrable under the Land Charges Act, 1925; others are not so registrable (*k*), but in either case it is submitted that, as they are clearly (sometimes expressly: see, *e.g.*, Civil Aviation Act, 1946, s. 26 (6)) intended to be binding on subsequent owners, etc., of the land, they must be within the meaning of the term now under consideration, and are therefore capable of subsisting as legal interests, and also must be included in the definition of land for the purposes of the 1925 property legislation (*l*).

It has been argued at times that options to purchase estates in land are themselves a species of interest in land. In *Oppenheimer* v. *Minister of Transport* (*m*) it was held that an option to purchase given for value, was an interest in land within the Lands Clauses Consolidation Act, 1845, for which the owner was entitled to compensation under the Act, if the property were compulsorily acquired. Such an option unlimited in point of time, is specifically enforceable against the original grantor notwithstanding the rule against perpetuities (*n*), but an unlimited option would be void under that rule where specific

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(*c*) "In determining either the general object of the Legislature or the meaning of its language in any particular passage, it is obvious that the intention which appears to be most in accord with convenience, reason, justice, and legal principles, should, in all cases of doubtful significance, be presumed to be the true one"—Maxwell's *Interpretation of Statutes*, 9th ed., at p. 198.

(*d*) Compare views of Wolstenholme and Cherry in *Conveyancing Statutes*, 12th ed., Vol. 1, p. 549, note to L. P. A., s. 187 (1).

(*e*) New Towns Act, 1946, s. 4.

(*f*) This expression has a wider meaning than "local planning authority" in the same Act: see s. 119 (1).

(*g*). S. 38.

(*h*) Originally the Emergency Powers (Defence) Acts, 1939 and 1940, but see now the Supplies and Services (Transitional Powers) Act, 1945, and the Supplies and Services (Extended Purposes) Act, 1947.

(*i*) See article in this journal entitled "Statutory Charges on Land", September, 1947, Vol. 12, No. 1, p. 45.

(*k*) *Lewisham Corporation* v. *Maloney*, [1947] 2 All E. R. 36.

(*l*) But see Cozens-Hardy, M.R., in *Eccles Corporation* v. *South Lancashire Tramways Co.* (1910), 79 L. J. Ch. 759: "a parliamentary franchise of this kind is not a bit of property which the owner can dispose of just as he might a stick or a table or an acre of land".

(*m*) [1941] 3 All E. R. 485.

(*n*) *Hutton* v. *Watling*, [1947] 2 All E. R. 641.

performance was claimed against the successors in title of the original grantor (*o*). Such an option given for value is registrable as an estate contract under the Land Charges Act, 1925 (section 10, Class C (iv)), but if it be limited for a term of years absolute (within the perpetuity period) this would not in logic prevent the interest from being included in " easements, rights and privileges " (*p*). However, at common law, the holder of the benefit of the option would not have been able to enforce the option by an action for damages against any owner of the land other than the original grantor of the option, but the equitable right to specific performance would be refused only as against a purchaser of the legal estate in the land for value without notice of the option, and of course notice since 1925 means registration. Options, like restrictive covenants, are presumably *not* therefore to be regarded as legal interests in land within section 1, L. P. A.

Benefits.

This word does not appear in the list of concepts capable of being legal interests, but it is included in the definition of " land " in the Law of Property statutes. For this purpose, therefore, it would seem that " benefits " could reasonably be held to include restrictive covenants, and options to purchase an interest in land (provided the same were limited to take effect within a definite term of years absolute within the perpetuity period). " Benefits " so interpreted must therefore be created by deed, and are capable of being the subject-matter of a settlement for the purposes of the Settled Land Act, 1925; not being estates, however, they are capable of being held in undivided shares and may be vested in an infant.

Registered Land.

It is a basic principle of registration under the Land Registration Act, 1925 (*q*) that those incumbrances which in unregistered conveyancing are binding on a purchaser for value should be entered on the register, but that only " overriding interests " should be so binding without some specific mention somewhere in the register; overriding interests are said to be those that would be evident upon inspection of the property, or such as would be disclosed on inquiry of persons in occupation of the land (a warning that such inspection and inquiry should be carried out is indorsed on the inside cover of the land certificate); in section 3 (xvi) they are described as incumbrances, interests, rights and powers. The apologists of the scheme of registered conveyancing argue that this is an accurate description of the overriding interests listed in section 70 (1), L. R. A. (but note the item added to this list by section 41 of the Coal Act, 1938), but in practice not every one of these would always be disclosed on such inspection or inquiry (*e.g.*, " liability to repair the chancel of any church "). From the wording of some sections it would appear that the draftsmen of the L. R. A. intended all " easements, rights, privileges

(*o*) *L. S. W. R.* v. *Gomm* (1882), 20 Ch. D. 562, and *Worthing Corpn.* v. *Heather*, [1906] 2 Ch. 532.

(*p*) Puisne mortgages, even if legal, are specifically made registrable as Class C (i) land charges.

(*q*) Hereinafter referred to as " L. R. A."

and benefits in or over land" in the sense above discussed to be overriding interests. For instance, under section 70 (2), it is provided that "where at the time of first registration any easement, right, privilege or benefit created by an instrument and appearing on the title adversely affects the land, the registrar shall enter a note thereof on the register"; overriding interests which are not easements, rights, etc. (if there be any such), but which are subsisting at the time of first registration are therefore, presumably, not to be similarly dealt with. Again, a registered proprietor may accept the grant of "any easement, right or privilege, or the benefit of any restrictive covenant or provision" (section 108), and may himself grant such an interest "in the prescribed manner" under section 18 (1) (c), but there is no specific provision for the acceptance or grant of an overriding interest *eo nomine*.

It is now proposed to consider which of the herein previously discussed rights are definitely to be included in the list of overriding interests, and which overriding interests are not capable of being described as easements, rights, privileges or benefits in or over land.

(a) The following easements, etc., are clearly overriding interests within section 70 (1), L. R. A.:

(i) Legal easements (see para. (a) of the section).

(ii) Equitable interests, as the L. R. A. and the Rules made thereunder do not require equitable easements to be noted on the register (see same paragraph) (*r*).

(iii) Profits *à prendre* (*ibid.*).

(iv) Customary rights, rights of common, drainage rights, public rights of way, etc. (*ibid.*).

(v) Tenancies at will and at sufferance, unless inquiry has been made of the person in actual possession of the land or in receipt of the rents and profits thereof. The person in receipt of the rents and profits need not necessarily disclose such a tenancy, and it seems anomalous that the status of an interest should depend on such an arbitrary factor, but the wording of the section is clear (see *ibid.*, para. (g)).

(b) The following easements, etc., are clearly *not* overriding interests within the meaning of the above section:

(i) "Easements" in course of prescription. Such rights are also not capable of being noted on the register, although the fact of registration of the title should not prevent the rights from being enforced, where applicable, under the ordinary law (*s*). As we have seen, these are capable of being described as "rights" in the sense under discussion, and so also fall within the definition of legal estates for the purposes of the L. R. A. (*t*); they are also therefore capable of registration in themselves, and it is suggested that the person entitled in a case where the right is likely to be of value, should take this step as a precautionary measure.

(ii) Restrictive covenants and options to purchase; as these are

(*r*) See argument in Key & Elphinstone's *Conveyancing Precedents*, 14th ed., Vol. 3, by H. Potter.

(*s*) As in *Browne* v. *Flower, etc., supra.*

(*t*) "'Legal estates' mean the estates, interests and charges in or over land subsisting or created at law which are by the L. P. A. authorised to subsist or to be created at law": L. R. A., s. 3 (xi).

equitable interests, they will take effect as minor interests and as such should be noted on the charges register.

(c) The following overriding interests appear not to fall within the description " easements, rights, etc." :

(i) Rents and charges having their origin in tenure, and manorial and seignorial rights not yet extinguished; these are not estates or interests in themselves, but rather the incidents of estates and interests.

(ii) Liability to repair church chancels, embankments, and sea and river walls.

(d) Other overriding interests fall within the term " easements, rights, etc. ", and so are entitled to rank as legal interests. These may be classified as follows :

(i) Rights of persons in actual occupation.

(ii) Incorporeal hereditaments, not specifically discussed above.

(e) The special rights vested in public or other authorities under various statutes hereinbefore discussed, do not easily fit in to the scheme of the L. R. A. A cynical lawyer might with some reason suggest that the draftsmen of such statutes as the Town and Country Planning Act, 1947 (*u*), the Hill Farming Act, 1946, and the Civil Aviation Act, 1946, to name only a few of these complicated statutes, have completely forgotten that a considerable proportion of the titles to land in this country are registered under the L. R. A. The older forms of rights of this nature, such as land tax, local land charges, payments in lieu of tithe, etc., and the exceptional case of rights created under the Coal Act, 1938 (*a*), are specifically made overriding interests, but otherwise, and in the more recent statutes, no such provision has been included; nevertheless it can scarcely be argued logically that unless such rights are specifically noted on the register (which is certainly not normal Registry practice), they will not be binding on subsequent purchasers (*b*). Although these statutes must be strictly construed, as being restrictive of existing rights, the Courts would not allow the clear intention of Parliament readily to be negatived. Maxwell, in *Interpretation of Statutes* (9th ed., at p. 289) observes that the paramount rule of construction is " that every statute is to be expounded according to its expressed or manifest intention, and that all cases within the mischiefs aimed at are, if the language permits, to be held to fall within its remedial influence ". Easements, rights and privileges of this nature are, it is submitted, none the less legal interests, although the title is registered. As in the case of easements in course of prescription (*supra*), they will be legal estates for the purposes of the L. R. A., and so will be capable of registration in themselves, although it must be admitted that (*e.g.*) the Minister of Civil Aviation is not likely to demand a land certificate covering his rights over a piece of land which he enjoys in respect of

(*u*) This statute, although as Mr. Kekwick said in the preface to his *Town and Country Planning Law*, it could properly have been entitled the " Real Property Act, 1947 ", contains no reference whatever to the L. R. A., and only the most casual of references to the L. P. A. To take but one example, a purchaser from a registered proprietor will have to make similar inquiries as in the case of unregistered conveyancing, as to the satisfaction of any outstanding development charges (see, *e.g.*, s. 71 (3) of the 1947 Act). It is unfortunate that no provision was made in the Act for such matters to be entered on the register of the title concerned.

(*a*) See s. 41 of the Act.

(*b*) See by analogy the argument in *Lewisham Corporation* v. *Maloney* (*supra*).

an adjoining civil aerodrome, under section 26 (6) of the Civil Aviation Act, 1946.

Conclusion.

It is submitted that insufficient attention has been paid in the past, by conveyancers and students alike, to the exact meaning of the phrase at the head of this article. In the system of unregistered conveyancing, it is important as a test of the status of the right in question; for matters of assignability, succession, etc., it may be essential to establish whether or not a particular right is a legal interest. The system of registered conveyancing is at present in the background of the professional consciousness; the extension of compulsory registration proposed in 1939 has been postponed *sine die*, and inordinate delays at the Registry and the large number of official forms a practitioner is obliged to complete for so many other matters, have combined to increase the unpopularity of voluntary registration. This is, it is submitted, but a transitory feature; when the process of post-war reconstruction has been completed, registered conveyancing will once more increase in popularity, especially among the advisers of those public authorities who will own so large a proportion of the land surface of post-war England. Then the seriousness of the creation of a large number of hybrid rights under recent statutes, which have not been limited so as to fit into either the registered system, or that of unregistered conveyancing under the L. P. A., will become apparent. As registration of title increases, the divergence between the meaning of overriding interests for the purposes of the L. R. A., and the significance of " easements, rights and privileges " for the purposes of the L. P. A., will also become obvious, and will, it is suggested, one day have to be resolved by legislation.

TENANT AT WILL OF THE COUNTY AGRICULTURAL EXECUTIVE COMMITTEE

After a false start in connection with section 86 of the Agriculture Act (*ante*, p. 161), the Ministry has issued a sheaf of Statutory Instruments (as Statutory Rules and Orders are now called) some of which are referred to on another page. The Agriculture Act, 1947 (Commencement) No. 1, Order 342/1948, brings into operation Parts II and III and one or two sections and schedules (*ante*, p. 167). Part III deals with agricultural tenancies and we publish a note by Mr. Muir Watt on p. 170. This note is concerned with Orders affecting Part II, which contains the provisions for enforcing good estate management and good husbandry upon pain of forfeiture (see the article in the September, 1947, part (*ante*, p. 3)).

Talking one day with someone outside official circles who had had a good deal to do with the Bill we asked him why he had not fought the provisions for constituting agricultural land tribunals from which there appears to be no appeal, though they are comprised of one lawyer

and two other persons representing owners and farmers from a panel appointed by the Minister and the decision is by majority. We put the point that since a number of these tribunals are contemplated consistency might not exist to which point he agreed. But inconsistency is apt to breed injustice. His reply was that the farmer could not afford the expense of High Court litigation. To our suggestion that the financial problem might be met by a variety of methods his answer was that the powers would so rarely be exercised that the matter was insignificant. To the further suggestion that if this was the case the question of expense was still less important there seemed no answer at all. It is, of course, a case of confusion of thought. The Orders now issued may be a cold douche on the optimism that the powers will scarcely be exercised.

Order 192/1948 sets out the areas for which Agricultural Land Tribunals are to be constituted. There are eight of these. The Agriculture (Procedure of Agricultural Land Tribunals) Order, 186/1948 sets out the procedure to be followed by the tribunals, which contains one or two forms, such as notice of hearing and notice of application. The rules are not elaborate, but they do indicate a procedure in the nature of a trial and they will, therefore, be correspondingly expensive, though without interlocutory proceedings. This last may prove to be a not unmixed blessing. From personal experience of tribunals where the issues are not too closely defined, we know something of difficulties and sometimes delay arising from the unexpected.

The party may be represented either by a lawyer or by any other person whether or not having professional qualifications—let lawyers note and remember the lessons of income tax and rating. This, too, may prove a not unmixed blessing as may the article which dispenses with the necessity of observing formal rules of evidence. Witnesses may be summoned under the provisions of county court rules.

It should be borne in mind that these tribunals will deal with matters under Part III relating to agricultural tenancies as well as under Part II. But it seems improbable that these rules do not contemplate enforcement under Part II.

The substance of Part II is that failure to observe the rules of good estate management and good husbandry shall be followed by a Supervision Order. If such an Order is not effective to the purpose the Act gives the Minister the right compulsorily to acquire the land, dispossess the farmer, or have the occupation changed to a person approved by him. Equally if the owner is not satisfied with the tenant's farming he cannot make him quit the tenancy without the consent of the Minister : see section 31 of the Act and the Agriculture (Control of Notices to Quit) Regulations 190/1948 (*ante*, p. 168).

Now it might be supposed that if this control was to be exercised by officials in Whitehall there might be many directions but little control. No doubt this may have been a general feeling. If this view existed it is completely shattered by the Agriculture (Delegation to County Agricultural Executive Committees) Regulations 187/1948. These Regulations delegate practically the whole of the powers of the Minister (with the exception of compulsory acquisition of land) to the County Agricultural Committees. They will make Supervision Orders, review and revoke them; they will give directions to secure good

estate management and good husbandry, and approve competent managers; approve a new occupier where the old occupier is dispossessed; give consent to a notice to quit; and even keep the register of owners and persons who are trustees or interested under settlements (*a*) and approve the person to be treated as owner. This is not all the things they will do, but we think the catalogue brings home how far control is in the hands of the Committee.

The essential point is that subject to ministerial directions to the Committees, which are to be expected, the agricultural policy of each county must in large measure depend upon the County Committee. This Committee will, in effect, have the power of life or death over the farmer and of extrusion over the landowner subject, of course, to appeal to the Agricultural Land Tribunal. Now it will not be denied generally that farmers as a class are not the most progressive members of the community—we speak in terms of science—and that many worthy persons concerned with agriculture are still bound by tradition. The constitution of the County Committee, appointed by the Minister, appears to be likely to be predominantly those concerned with agriculture. We tremble to think what would have been the present plight of English agriculture had Coke of Holkham, for example, been subject to the jurisdiction of a County Agricultural Committee of his day. It is an interesting experiment to hand over what is now a protected occupation to the jurisdiction of a local body concerned with a vocation of which the standards can hardly be said to be settled. Even the solicitors and doctors do not leave the control of their highly developed standards to local bodies and neither the Law Society nor the General Medical Council can disqualify for inefficiency.

The safeguard against the whims and fancies (if any) of the Agricultural Committee is the Agricultural Land Tribunal, and unless the Minister uses his power to constitute the same tribunal for more than one area, these tribunals cannot expect all to approach the question in the same way. Now the "plan" is unfolding we begin to see how little the landowner has left of freedom with his agricultural land. He can still sell it, though later on he may need the consent of the Minister to sell part of it. He can work it himself provided he does not do nor leave undone those things directed by the Committee and provided that he has not let it to a tenant who is protected by the Committee. He can let it, but if he does the Committee and not he will decide whether the tenant is working the farm properly. He cannot give the tenant notice to quit without the consent of the Committee unless he needs the land for a use other than agriculture for which he has the necessary planning permission, if such permission is requisite or he can satisfy the Committee that the tenant has been guilty of what amounts to bad tenancy: see section 31. We are driven to the conclusion that wise landowners and farmers will be sure to keep on the best possible terms with the County Committee. But we are left wondering whether this really will be good for English agriculture and England.

(*a*) See The Agriculture (Registration of Interests in Land) Regulations, 194/1948 with forms of application.

NOTES OF RECENT CASES.

1. *PROPERTY AND CONVEYANCING CASES*

Contract for sale—completion of contract—exchange of contracts.—The Court of Appeal have overruled the decision of Vaisey, J. (noted *ante*, p. 59), in *Eccles* v. *Bryant*, [1947] L. J. R. 418. The Court held that the customary method of completing a contract for sale of land was the exchange of contracts and so, notwithstanding that both parties had signed the engrossments of the contracts, yet, since they had not been exchanged, there could be no contract and specific performance could not be ordered. The vital point is that up to the time when the exchange takes place either party is at liberty to change his mind. If the exchange is by post the earliest point at which the contract is complete is when both parts have been posted. The Court did not have to decide whether the time would be later than that.

Contract for sale—sufficient memorandum—receipt—admission.—*Beckett* v. *Nurse*, [1948] L. J. R. 450, deals with the difference between a written contract and a memorandum of an oral contract. The memorandum was: "Received from E. B. of, etc., the sum of seventeen pounds being a deposit for a field situate near the Fox Inn. Sold for £50." It bore a twopenny stamp and was signed and dated by the defendant only. The County Court Judge held that it constituted a contract and the Court of Appeal held that it did not (Goddard, C.J., *dubitante*). The defendant wished to give evidence that this writing did not contain the real bargain between the parties. This evidence was rejected by the learned County Court Judge on the ground that the receipt constituted the contract. As the Court of Appeal held that the memorandum did not constitute a contract the case was remitted for a new trial. If the plaintiff had to give oral evidence of the contract further questions would arise, of which the most important was whether the memorandum was a sufficient memorandum of the contract. This would enable the defendant to produce evidence to show that it was insufficient: cf. *Johnson* v. *Humphrey*, [1946] 1 All E. R. 460 (noted *ante*, Vol. 10, p. 220). In *Hawkins* v. *Price*, [1947] L. J. R. 887, a receipt in something of the same form was held to be insufficient on the ground that it made no reference to vacant possession and not being exclusively for the plaintiff's benefit he could not waive this term and seek specific performance without it (cf. *Fry on Specific Performance*, 6th ed., at p. 243).

The instant case also contained one other point. It was held that even if the receipt was accepted in evidence as an admission it was not conclusive against the defendant. He could produce evidence to show that it was not a complete memorandum of the contract. Such an admission only went to the existence of the contract and not its complete terms.

(1 K. & E., pp. 343 n. (*q*).)

Agreement for a lease—non-registration as land charge—yearly tenant as "estate owner".—Sharp v. *Coates,* [1948] 1 All E. R. 136, is an illustration of the fallacy of the aphorism that "an agreement for a lease is as good as a lease". Here, a yearly tenant, holding of his mother, the freeholder, entered into an agreement with a sub-tenant to grant a ten years' term when he became freeholder on his mother's death. This agreement was never registered under the Land Charges Act, and on the death of the mother the sub-lessor sold the freehold to a purchaser. Humphreys, J., held that the purchaser could recover possession notwithstanding that he knew of the agreement. The sub-lessor, having a legal tenancy, was an estate owner within the definition of the Land Charges Act and, therefore, the agreement to grant a lease required to be registered under the Land Charges Act, s. 10 (1), Class C (iv). It is important, perhaps, to note that the yearly tenancy of the sub-tenant was good and required to be determined by a valid notice. The report does not contain any discussion of the question whether a purchaser who had notice of the existence of the agreement and could have inspected the agreement was acting bona fide in disregarding the agreement. It appears to have been assumed that this question did not arise. It will be borne in mind that purchaser as defined by the Land Charges Act does not require him to be a "purchaser in good faith" as is required in the Law of Property Act and the Settled Land Act. Perhaps, this case is an authority for the proposition that this distinction in wording between the Acts exonerates a purchaser under the Land Charges Act from acting in good faith, at least so far as actual and constructive notice is concerned. We think that this must be the proper construction of the Act.

It is an interesting point that, as the sub-tenant was in occupation, had the land been registered land he might have had an overriding interest which would have bound the registered proprietor. Lease is defined by the Land Registration Act to include an agreement for a lease and the rights of a person in occupation are overriding interests under section 70 of the Land Registration Act: as is a lease (perhaps including an agreement for a lease) providing it is for a term not exceeding twenty-one years. It is true that the possession did not arise from the agreement for a lease but from the existing yearly tenancy, but it was certainly a right vested in the person in possession. If and when the question arises some interesting law may be laid down.

Joint tenants—statutory trust for sale—continuance of trust in last survivor.—Re Cook, [1948] 1 All E. R. 231, brings out in a rather forcible form the character of the legal fiction called a statutory trust for sale under section 36 of the Law of Property Act. A freehold was conveyed to A and B "in fee simple as joint tenants" thus constituting A and B trustees for sale for themselves beneficially entitled. A died in the lifetime of B. B then died leaving her personal estate to C and D. Harman, J., held that the bequest of personal estate did not pass any interest in the freehold as it would have done had the trust for sale continued: *Re Kempthorne,* [1930] 1 Ch. 268. On the death of A the freehold became vested in B in severalty and the trust for sale ceased to exist so that B's beneficial interest was converted from personalty into realty.

It is, of course, a general proposition that a person cannot be trustee solely for himself because the equitable or beneficial interest is swallowed up in the legal estate—there is no interest which can be enforced by one person against the other. Adopting this principle the learned Judge held

that the words in the amendment to section 36 of the Law of Property Act contained in the 1926 Act: "nothing in this Act affects the right of a survivor of joint tenants who is solely and beneficially interested, to deal with the legal estate as if it were not held on trust for sale" did not affect the application of the principle. It should be observed that the learned Judge made no reference to section 23 of the Law of Property Act which provides that in favour of a purchaser a trust for sale is deemed to subsist until there is a conveyance to or by the direction of the persons absolutely and beneficially entitled. The result of the decision appears to be as follows. The sole surviving joint tenant holds in severalty free from the statutory trusts, but a purchaser is protected if he takes under the statutory trust for sale (provided a new trustee is appointed), and in these circumstances is not required to investigate the equities. If a purchaser accepts a title otherwise than under the non-existent but effectual trust for sale he is, of course, required to investigate the equities and will not be protected (*perhaps*) if there was a severance of the joint tenancy before it became vested in the surviving joint tenant. It remains not at all clear whether a purchaser can insist upon a conveyance under the trust for sale by reason of the Law of Property Act, s. 42. If this is so, the ambiguity of the situation becomes complete.

(*Ante*, Vol. 9, p. 73.)

New Trustees—power to appoint not in beneficiaries' sui juris and absolutely entitled.—Having regard to the existence of statutory trusts for sale imposed by law the decision in *Re Brockbank*, [1948] 1 All E. R. 287, comes as a salutary check on the optimism of those who are inclined to treat absolute beneficial interests as equivalent to legal ownership. In this case the beneficial interests were vested in A for life and subject thereto in others absolutely, and all beneficiaries were *sui juris* and so could have put an end to the trust. The power of appointing a new trustee was vested in the surviving trustees. One of the trustees wished to retire and the other was informed that the beneficiaries wished him to concur with the retiring trustee to appoint a Bank trustee in the place of them both. The other trustee declined to do this and Vaisey, J., held that he had no jurisdiction to interfere. The beneficiaries could require the property to be conveyed to them or to someone else, but this would determine the existing trust and would involve Inland Revenue complications. If on the other hand the trust was kept alive then the power to appoint new trustees remained in the person, in this case the trustee, and the Court could not interfere nor could the beneficiaries unless the power was not properly exercised.

(1 K. & E., p. 136.)

Settlement—sums becoming vested in another—forfeiture—alien enemy. —*Fraenkel* v. *Whitty*, [1948] L. J. R. 322, shows the nicety of definition necessary to forfeiture clauses. Here a monthly sum was payable under a settlement executed in 1937. The covenant contained a provision for cesser if the sums or some part thereof became vested in or payable to some other person. Roxburgh, J., held that when the covenantee became an alien enemy "some part" of the monthly sums became payable to the Public Trustee under the Trading with the Enemy Act, 1939. The learned Judge distinguished *Re Wightman* (unreported but noted at p. 647), where Romer, J., held that the cesser did not operate because the *whole* of the

sums payable did not vest in the Public Trustee but only such sums until the end of the war. The point is that these cesser clauses are always framed by reference to an absolute interest vesting, but monthly sums do not usually vest *in toto*. Of course this case brings out the point that if such cesser is sought the words " or some part thereof " are necessary. Otherwise, apparently, a beneficiary could always defeat the cesser clause by assigning all but the last payment due thereunder.

(2 K. & E., p. 867, f. 12.)

Settlement—substitutional gifts—perpetuities—class gifts.—Re Lord's Settlement, [1948] L. J. R. 207, does not really provide any new law, but some very interesting illustrations of the traps in drafting, particularly in connection with class gifts. Under a settlement following a life interest, the fund was to vest in all the children who attained twenty-one and were living at the date at which the youngest child attained that age, with a further clause that if any child died before attaining a vested interest leaving children such children should take " by substitution " on *attaining twenty-one* the share of the deceased parent. Romer, J., held that the children and grandchildren took as one class. Having so held it became apparent that a member of the class (*i.e.*, a grandchild) was an unascertained person who could attain a vested interest more than twenty-one years after the death of the life tenant, who was the only life in being. Hence the whole gift failed: *Pearks* v. *Moseley* (1880), 5 App. Cas. 714.

The only real issue in this case was the question of construction, whether or not the further clause operated as a proviso making the additional members a separate class or whether it should be construed as if they were one class. Even the words " by substitution " were treated as having no true " substitutionary " effect, following the meaning attributed in *Lanphier* v. *Buck,* 2 Drew. & Sim. 484. It is interesting to note that by treating this " proviso " as no true proviso the gift failed notwithstanding that it is a principle that instruments should so far as possible be construed to prevent failure. There is food for thought here. Class gifts, though increasingly common, are peculiarly tricky both to frame and to construe. If the draftsman strays the least outside one of the well-defined precedents he should observe the utmost caution.

(2 K. & E., p. 890 n. (*o*), p. 1048)

Trespass—shooting dogs chasing animals—preservation of property.—The observations of Scott, L.J., in *Cresswell* v. *Sirl,* [1947] 2 All E. R. 730, go a great deal further than the actual issue which was the principle of liability for shooting animals chasing the defendant's cattle. Scott, L.J., applied to trespass generally the principle in *Cope* v. *Sharpe* (*No.* 2), [1912] 1 K. B., at p. 504, that where " there was such real and imminent danger to [the defendant's] property that he was entitled to act " he could take any steps " reasonably necessary in the sense of acts which a reasonable man would properly do to meet a real danger ". Trespass included shooting animals so that if there was no other way reasonably practicable to avoid attacking the cattle of the defendant he could shoot them. He could even shoot them if, having regard to all the circumstances, he acted reasonably in thinking that shooting was necessary notwithstanding that actually it was not.

But as we have said the vital point is to find once again the Court of Appeal adopting the principle that acts reasonably necessary or

reasonably regarded as necessary to protect one's own property are justified notwithstanding that they constitute a trespass, even amounting to destruction of the defendant's property. In our view where the plaintiff is not in default at all, which is difficult to substantiate where fire is escaping, *Cope* v. *Sharpe* (*supra*), or dogs are attacking cattle, *Cresswell* v. *Sirl*, this general principle may be too widely stated, and it would be unsafe to rely upon it.

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2. *CHARITIES*

Condition not fulfilled—failure of will trustees to buy land for village hall—gift upheld but scheme directed.—In *Re Jones*, [1948] Ch. 67, a testatrix directed her trustees to buy land for a village hall and to convey it to certain institute trustees. If the institute trustees had not built the hall within five years from her death the land was to be sold and proceeds paid to certain beneficiaries. The trustees, in fact, never bought the land. Roxburgh, J., held that the will trustees could not by their conduct alter the interest of the institute trustees, and, therefore, as it was the will trustee's conduct which had prevented the condition being fulfilled the gift over did not take effect. The learned Judge applied a principle adopted from *Lewin on Trusts*, 14th ed., p. 799, which was primarily directed to the doctrine of conversion. He also applied the rule that conditions should be strictly construed: *Yates* v. *University College*, L. R. 7 H. L. 438, where the testator had failed to draw up the regulations to which his gift was directed to be subject and the gift was held valid. It is to be noted that the case also is authority for the proposition that a gift for a village hall is a good charitable gift. Again, if the charitable gift remains unperformed because it has never begun to be carried out yet a *cy près* scheme can be applied. This is to be distinguished from the case next noted, *Re Lucas*, where the gift failed because an existing charity had ceased to exist prior to the death of the testatrix. In the instant case the charity should have been carried out but was not; in *Re Lucas* it *could* not be carried out because the charity had ceased to be possible.

(Tudor, pp. 79 n. (*s*).)

Charitable institution ceasing in testatrix's lifetime—lapse.—Unless there is a general charitable intention to be ascertained on the construction of the will as a whole a gift to a specific charity which ceases to exist in the testator's lifetime will lapse: *Re Rymer*, [1895] 1 Ch. 19. There has been some fluctuation in the readiness of the Court to find a general charitable intention, but the current of authority tends away from it: see *Re Harwood*, [1936] Ch. 285; *Re Tharp* (1943), 112 L. J. Ch. 3; *Re Goldney*, 115 L. J. Ch. 337. *Re Lucas*, [1947] 2 All E. R. 773, follows the same trend and contains some useful smaller points. Here the testatrix made a gift to "the Crippled Children's Home, Lindley Moor, Huddersfield". This Home was closed prior to the death of the testatrix, but the funds were being applied *cy près* under a scheme. Roxburgh, J., held that it was a gift to a specific institution and that institution having ceased to exist and there being no general charitable intention the gift lapsed. The vital point of the continuance of the fund, though not the institution, appears to depend upon the character of the intention of the gift. If the gift is to a fund in augmentation of it rather than to any specific institution then, so long as the fund lasts, the gift will

not fail. But if the gift is to an institution, the continuance of the fund out of which the institution was supported, will not save the gift. Whether it is the fund or the institution that is intended to benefit may fall within the class of latent ambiguity, at least if there is any doubt about names: *Re Tharp* (*supra*), and this will let in direct evidence of intention, but in any case surrounding circumstances would appear to be admissible.

It may also be convenient to point out that, if the institution never in fact existed it may be easier to find a general charitable intention: *Re Knox,* [1937] Ch. 109.

Roxburgh, J., held that the fact that the fund was administered under a scheme of the Charity Commissioners and not under the trust deed was irrelevant, as also was the fact that the Treasurer could give a good receipt under the common form clause.

(Tudor, pp. 144, 147)

Charitable institution ceasing—lapse—future legacy—" mission work ". —The same question arose though from a different angle in *Re Moon's Will Trusts,* [1948] 1 All E. R. 300. Here a testator made a bequest for " mission work " in Devonport subject to a life interest. Before the death of the life tenant the church and district was severely damaged by enemy action and it became doubtful whether in the district it was possible to carry on the work of the church concerned. Roxburgh, J., held, first, that " mission work " was confined to a religious purpose and was charitable. On this point it is a matter of construction and all the circumstances must be considered. The learned Judge pointed out that one *lacuna* in the evidence was the failure to say whether or not the testator was a member of the church and knew about the mission work. It should always be borne in mind in drafting the affidavits in these cases where doubt about the work is concerned that the settlor's knowledge may be relevant.

The learned Judge then held that the date at which the cessation of the institutions was material was that on which the property vested and not that on which it fell into possession. This is an extension of the principle in *Re Slevin,* [1891] 2 Ch. 236, where it was held that where a legacy had become due but had not been paid when the charitable institution ceased the money was applied *cy près* under a scheme. With respect we do not see how the learned Judge could have held otherwise—to do so would have converted a vested interest into an interest contingent upon the charity surviving the life tenant.

(Tudor, pp. 33, 48)

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3. *WILL CASES*

By J. H. C. MORRIS, B.C.L., M.A., of Gray's Inn, Barrister-at-Law

Gift over on failure of issue to attain twenty-one—exclusion of children of proposed marriage—fraud upon a power.—The Court of Appeal have affirmed the two decisions of Vaisey, J., in *Re Crawshay* (*No.* 1), [1946] Ch. 711, noted *ante,* Vol. 11, p. 117, dealing with the question of construction, and *Re Crawshay* (*No.* 2), [1947] Ch. 356, noted *ante,* p. 64, dealing with the question of fraud upon a power: (1948), 64 T. L. R. 67. As the reasoning was the same as in the Court below, and Vaisey, J.'s judgments were expressly approved, no further comment is necessary.

(Theobald 597; 1 K. & E. 94)

Conflict of laws—renvoi—operation of residuary gift.—The Court of Appeal have now affirmed the judgment of Wynn-Parry, J., in *Re Duke of Wellington,* [1947] Ch. 506, noted *ante,* p. 143: (1948), 64 T. L. R. 54. The judgment of the Court of Appeal as reported comprises three sentences only and is as follows: "The Master of the Rolls said that the Court were unanimously of opinion that Wynn-Parry, J., was right *in his construction of the wills.* The gifts in question were not to two persons, one of whom was the Duke of Wellington and the other the Duke of Ciudad Rodrigo. The Court agreed with the Judge's conclusions and reasons, subject to one small formal variation in the order which he made" (italics supplied).

It is therefore clear that the decision of the Court of Appeal turned entirely on English domestic law and that counsel for the appellant did not even argue the point that Spanish law might have meant Spanish internal law. The doctrine of *renvoi* has only twice been considered by an appellate Court in the whole of its history in the entire British Commonwealth. In one of those cases—*Bremer* v. *Freeman* (1857), 10 Moo. P. C. 306—the judgment of the Privy Council is so intricate and obscure that the case has been hailed as a decisive authority both for and against the *renvoi.* In the other—*Ross* v. *Ross* (1894), 25 Can. S. C. R. 307—the *renvoi* point was only a secondary one and was disposed of quite casually, whereas the dissenting Judge delivered a vigorous and reasoned judgment. The *renvoi* doctrine derives whatever authority it has in English law from decisions of single Judges, differing widely in their reasoning and technically not binding on other Judges, and involving theoretical and practical difficulties which the Judges have never adequately considered. In view of these facts, the crying need has long been for a thorough reconsideration of the doctrine by a superior Court; and the failure of counsel to seize the opportunity offered by the *Wellington Case* is therefore most unfortunate.

(Theobald 15, 177)

Conflict of laws—legitimacy.—In *Re Bischoffsheim,* [1947] 2 All E. R. 830, Romer, J., had to consider a very difficult question in the conflict of laws, namely what law determines whether a child is legitimate or illegitimate. On this question there are three different views. (1) According to the orthodox view, held by Dicey and Westlake, a child is legitimate if, and only if, he is born in lawful wedlock. This view derives considerable support from the decided cases and especially from *Brook* v. *Brook* (1861), 9 H. L. C. 193; *Shaw* v. *Gould* (1868), L. R. 3 H. L. 55, and *Re Paine,* [1940] Ch. 46. The theoretical objection to it is that it fails to take account of the possibility that in some systems of law a child may, under the doctrine of putative marriage, be legitimate even though his parents were not and could not be validly married: see *Khoo Hooi Leng* v. *Khoo Hean Kwee,* [1926] A. C. 529, 543, and *Berthiaume* v. *Dastous,* [1930] A. C. 79, 87–88. But this difficulty has not so far arisen in practice. (2) According to another view, held by Cheshire, Wolff and Schmitthoff, legitimacy is a question of status and is therefore determined by the law of the child's domicile of origin. But this view, besides being hopelessly inconsistent with leading and recent authority, involves a serious logical difficulty. For, since a child's domicile of origin is that of its father if legitimate and that of its mother if illegitimate, how can the legitimacy of the child depend upon the law of its domicile of origin if its domicile of origin depends upon its legitimacy? If the father and mother are domiciled in different countries, the second view involves a vicious circle. (3) According to a third view, recently advanced by Welsh in 63 L. Q. R. 65 (1947),

the question whether a child is legitimate is simply a question of construction, and is therefore governed by the law of the domicile, not of the child or its parents, but of the testator whose will is being construed. This view lacks support in the cases, but is not actually inconsistent with any decision.

In *Re Bischoffsheim* a testator, presumably domiciled in England (the report is silent on this point), gave a share of residue to his granddaughter Nesta for life with remainder to her children. In 1917 Nesta was married in New York to George, the brother of her deceased husband, and she had a son Richard who was born in 1920. The marriage was valid by the law of New York, but it was invalid by English domestic law at that time. In 1917 Nesta and George were probably domiciled in England, therefore the marriage was void; but they were certainly domiciled in New York in 1920, and therefore it was argued that Richard was legitimate and could take under the will. According to views (1) and (3) he was illegitimate and could not take; but Romer, J., adopted view (2) and held that Richard could take because he was legitimate by the law of his domicile of origin. The decision seems open to the following criticisms :—

(1) It was expressly based on *dicta* in *Re Goodman's Trusts* (1881), 17 Ch. D. 266, and *Re Andros* (1883), 24 Ch. D. 637. But these were cases on legitimation, not legitimacy. Romer, J., says " there is no real distinction between the two classes of case. If in fact the status of legitimacy is conferred by the law of the domicile of origin, the time of, as also the reason for, its conferment are surely immaterial ". The learned Judge seems to have assumed that questions of legitimation are governed by the law of the child's domicile of origin. But this is, of course, not so, for at common law the question depends on the law of the father's domicile at the date of the child's birth and at the date of the subsequent marriage; and under the Legitimacy Act, 1926, s. 8, the question depends on the law of the father's domicile at the date of the marriage. In both cases the law of the child's domicile of origin might well be different.

(2) If Nesta had never lived with George in New York, she would have retained her English domicile of origin. In that case Romer, J.'s test would have produced no solution, because it would have been impossible to determine what was Richard's domicile of origin without first determining whether he was legitimate.

(3) The decision is very difficult to reconcile with the well-known decision of the House of Lords in *Shaw* v. *Gould* (1868), L. R. 3 H. L. 55, where the parents were not validly married, because the mother's divorce was invalid, and therefore the children were held to be illegitimate, although they were legitimate by the law of their father's domicile at the date of their birth. Romer, J., points out, what is certainly true, that the domicile of origin of the children was English, because their mother was never properly divorced from her first husband and therefore she retained his domicile; whereas in the present case the domicile of origin of Richard was in New York, because Nesta's first husband was dead and therefore she was free to acquire a domicile of choice. It remains true, however, that the House of Lords held that the children in *Shaw* v. *Gould* were illegitimate, not because they were illegitimate by their domicile of origin, but because their parents were not validly married, since the mother's divorce was invalid. Thus Romer, J.'s decision, while perhaps reconcilable with the actual decision in *Shaw* v. *Gould,* is not reconcilable with the reasoning of the House of Lords.

(4) No amount of ingenuity can reconcile the decision with that of Stirling, J., in *Re Bethell* (1887), 38 Ch. D. 220. In that case the child was illegitimate because her father's marriage to a Baralong woman in South Africa was polygamous, and by the law of his domicile (English law)

he had no capacity to contract such a marriage. Yet by the Baralong law of the child's domicile of origin, she was undoubtedly legitimate.

(5) The decision is difficult to reconcile with the decision of Bennett, J., in *Re Paine*, [1940] Ch. 46, where the child was illegitimate because her mother's marriage was invalid, although she was legitimate by the law of her father's domicile at the date of her birth. In that case Bennett, J., correctly it is submitted, assumed that the legitimacy of the child depended on the validity of her mother's marriage, and never even considered the possibility that the child might be legitimate if she enjoyed that status by the law of her domicile of origin.

Neither *Re Bethell* nor *Re Paine* was cited in *Re Bischoffsheim*. The failure of counsel to cite the most recent and most relevant case seems at first sight surprising. The reason is no doubt that Cheshire, Wolff and Schmitthoff all fail to cite it as an authority on legitimacy (though they cite it as an authority on capacity to marry), possibly because it is inconsistent with their particular view on legitimacy.

My learned colleague Mr. Rupert Cross has suggested to me that it is consistent with all the cases to say that a child is legitimate if (and only if) the law of the domicil of *both* his parents at the date of his birth gives this result. Thus, in *Brook* v. *Brook* the child was illegitimate because at the date of his birth both his parents were domiciled in England; in *Shaw* v. *Gould* and *Re Paine* the children were illegitimate because the mothers were domiciled in England; in *Re Bethell* the child was illegitimate because the father was domiciled in England; but in *Re Bischoffsheim* the child was legitimate because both his parents were domiciled in New York. I believe that this formula does reconcile all the actual decisions, but it is scarcely reconcilable with the reasoning of the Courts. Moreover, it involves the conclusion that *Shaw* v. *Gould* would have been differently decided if Buxton (the first husband) had acquired a domicil in Scotland after the divorce but before the birth of the children.

(Theobald 216.)

Substitutionary gift—whether issue of daughter dead at the date of the will are entitled to share.—In the Scotch appeal of *Miller* v. *Gerrard*, [1947] A. C. 461, the House of Lords had to decide a question of construction which was a familiar one in the English Courts in the nineteenth century, but which rarely comes before them now. The reason no doubt is that draftsmen of wills usually rely on one or other of the excellent precedent books, which naturally avoid this particular trap.

The testatrix gave her residuary estate equally between her sisters. She went on to provide that "if any of my said sisters may have predeceased me leaving issue, such issue shall be entitled to the share or shares which their parent would have taken by survivance". At the date of the will the testatrix had six sisters living, all of whom survived her; but a seventh sister had already died leaving a daughter who survived the testatrix. The question was whether this granddaughter of the testatrix was entitled to a share of her residuary estate. The House of Lords decided that she was not. Since the House was divided three to two, and the decision of the Court of Session was reversed, it is obvious that the question of construction was a very nice one. The majority took the view that the class of sisters in the original gift comprised only those sisters who were alive at the date of the will, and the substitutionary gift to the issue of dead sisters therefore comprised only the issue of the same six sisters.

Lord Simon stressed the fact that the testatrix used the phrase "my *said* sisters" in the substitutionary gift. He observed: "Our attention

was not called to any previous case in which the limiting words 'the said' were used". The failure of counsel to cite any such case is surprising, because in *Re Thompson's Trust* (1854), 5 D. M. & G. 280, it was held that the use of these words showed that the testator was contemplating a class of children living at the date of the will, and capable of taking under it, and therefore the issue of children dead at the date of the will were not admitted.

Commenting on the instant case in the *Law Quarterly Review* (Vol. 64, p. 5), Professor Goodhart makes the surprising suggestion that it "may add to the difficulties of drafting a will because the draftsman must now cover in the will both the facts at the time when the will was executed and the facts when it becomes effective". This seems to read into the case far more than it contains. Every English conveyancer knows how to draft a substitutionary gift: in the present case it would only have been necessary for the testatrix to say "my sisters *living at my death*, if more than one in equal shares, and for all or any of the issue *living at my death* of any sister of mine who predeceases me" and so on. It was only because the testatrix's Scottish conveyancer failed to use a modern form that the case presented any difficulty.

(Theobald 471)

Inheritance (Family Provision) Act, 1938—power to order payments from a future date.—In *Re Franks* (1947), 63 T. L. R. 583, the testatrix had a son A by her first marriage in 1929 and a son B by her second marriage in 1946. Two days after the birth of B the testatrix died. By her will, made in 1940, she gave A an interest in her residue on his attaining twenty-one. There was of course no opportunity for her to alter her will after the birth of B. Wynn-Parry, J., held that the will did not make reasonable provision for B, who, however, did not need more than nominal provision to be made for him for some years to come. The learned Judge held that there was no power under section 3 (2) of the Inheritance (Family Provision) Act, 1938, to direct nominal payments to be made to B with liberty to apply when circumstances required a larger sum to be provided. He held, however, that there was power under section 1 (5) to order provision to be made for B from a future date. The date chosen by the learned Judge was A's twenty-first birthday, the date when he would cease to be a dependant within the meaning of the Act.

The case is a useful reminder that the test to be applied by the Court in considering applications under the Act is an objective one. The test is not: Has the testator acted unreasonably? but: Does the will make reasonable provision for the dependant?

(Theobald 73)

Meaning of "moneys on deposit".—In *Perrin* v. *Morgan*, [1943] A. C. 399, the House of Lords abolished the strict rule, which so often defeated the intentions of testators, that the word "money" in a will meant money in the strict sense only, *i.e.*, cash in hand and on current or deposit account at the bank. In *Re Moore*, [1947] Ir. R. 205, an Irish Court held that a gift of "any moneys on deposit in England" included National Savings Certificates issued by an English Post Office. "The authority of *Perrin* v. *Morgan*", said Gavan Duffy, J., "does not bind this Court, but I know no reason why I should not welcome a breath of fresh air from across the Channel, particularly when it disturbs cobwebs spun in London and dutifully

preserved with our borrowed collection of jural relics." The majority of the House of Lords will be relieved to hear that their decision commends itself to Dublin. In *Re Hodgson*, [1936] Ch. 203, Farwell, J., held that a gift of money did not include National Savings Certificates; but since *Perrin* v. *Morgan* the decision would no doubt be different.

(Theobald 152, n. 31)

Implication of gift to husband.—There have been many recent instances of wills being construed in accordance with what the testator must have meant, though not in accordance with what he literally said. *Re Smith* (1947), 63 T. L. R. 608, is a good illustration of this benevolent tendency. The testatrix appointed her husband an executor of her will and gave him all her personal chattels. She then provided that "in the event of my husband predeceasing me or dying within one month of my death" her residuary estate was to be divided between certain relatives of her husband and certain charities. She made no provision for the event (which happened) of her husband surviving her by more than one month. There was no issue of the marriage. Vaisey, J., held that there was an obvious omission in the will which could be supplied by implying an absolute gift of residue to the husband. It was very surprising that a testatrix who appointed her husband to be an executor of her will and gave him all her personal chattels, and was evidently on the best of terms with his relations, yet left no share in her residuary estate either to him or to his relations in the event which happened. Since it was clear not only that words had been omitted from the will, but also what those words were, the Court was entitled and bound to fill the gap.

Professor Goodhart (64 L. Q. R. 14) says the result was reached by applying common sense to the will, and that "if all other rules of construction were abolished and only this one remained, the law of wills would be both a simpler and a more practical one than is sometimes the case". It is easy to make these revolutionary suggestions, but perhaps the consequences are not always borne in mind. Not all rules of construction are uncertain in operation, and not all of them defeat the intention of testators. If a share of residue lapses, what does common sense indicate should be its destination, in the absence of a definite rule on the subject? An English lawyer would say that it goes to the next-of-kin, but a French lawyer would say it passes to the other residuary legatees. Can it be denied that it is better to have a rule on such matters, instead of arguing the point every time it arises?

(Theobald 535)

Whether annuity for lives or perpetual—rule against perpetuities.—In *Kirkby* v. *Phillips* (1947), 63 T. L. R. 631, the question arose on a very ancient will whether an annuity was given for lives only or was perpetual. The testator, who died in 1865, by his will made in 1863 gave the whole of his property to trustees in trust (among other things) to pay his adopted daughter Alfreda £100 a year during her life "and for her to give away by will to any child or children she may have". Alfreda died in 1940 having by her will made in 1898 exercised the power of appointment given to her by the testator's will by appointing the £100 a year to her children living at her death, and after the death of any of them to the survivors or survivor, and after the death of the survivor to such of her children as should be living at her death and had attained twenty-one or (being female) married

under that age. Alfreda left two children her surviving. Vaisey, J., held, first, that the annuity was not perpetual but was limited to the lives of Alfreda's children; secondly, that the gift to the surviving child infringed the rule against perpetuities, with the result that the two children shared equally for the rest of their lives.

(Theobald 350, n. 42; 416, n. 73)

Option to purchase exercisable within a certain time — whether exercisable after expiration of time.—In *Re Avard* (1947), 63 T. L. R. 567, the Court had to consider whether an option to purchase given by will and expressed to be exercisable only within a certain time, was capable of being exercised after that time had expired. The testatrix settled two cottages on her sister for life and after her death upon trust for sale. She gave an option to purchase the cottages for £500 to the tenant of one of them, the option to be exercised by notice in writing within three months of her sister's death. The testatrix's sister died on January 1, 1946, having sold the cottages for £1,600 in exercise of her Settled Land Act powers. The tenant died in 1935, but Roxburgh, J., held that the option to purchase was not personal to him but could be exercised by his personal representative. The personal representative claimed to exercise the option on April 10, 1946, saying he was not aware of the sister's death until the previous day. Roxburgh, J., held that he was ten days too late. The learned Judge said that the fact that the personal representative was a few days out of time was of no detriment whatever to anybody and made no practical difference at all, and that at first he was prepared to follow the line of authorities beginning with *Taylor* v. *Popham* (1782), 1 Bro. C. C. 168, and ending with *Re Goldsmith*, [1947] Ch. 339; but that he was bound to follow *Brooke* v. *Garrod* (1857), 2 De G. & J. 62, a decision of the Lord Chancellor given on appeal, and to hold that the option was not well exercised. The learned Judge's reference to *Re Goldsmith* is a little puzzling, because in that case (noted *ante*, p. 141) it was held that an option to purchase a house after the death of the testator's wife, exercisable within six months of the *testator's* death, was *not* exercisable within six months of the wife's death but had to be exercised within six months of the testator's death in accordance with the literal wording of the will.

(Theobald 167, n. 17; 450)

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4. *FAMILY LAW CASES*

By R. H. Graveson, Ph.D., S.J.D., LL.M., of Gray's Inn, Barrister-at-Law

Nullity of marriage—wilful refusal to consummate—whether use of contraceptives prevents consummation—Baxter v. *Baxter,* [1947] 2 All E. R. 886—*connotation of "wilful refusal to consummate a marriage"—Matrimonial Causes Act,* 1937, *s.* 7 (1) (*a*)—*Horton* v. *Horton,* [1947] 2 All E. R. 871.—These recent decisions of the House of Lords have gone far to remove the uncertainty formerly prevailing on the question of the nature of consummation of marriage and the meaning of "wilful refusal to consummate a marriage" in the sense of section 7 (1) (*a*) of the Matrimonial Causes Act, 1937.

In *Baxter* v. *Baxter* the husband appealed from a decision of the Court of Appeal ([1947] 1 All E. R. 386), affirming the dismissal of his petition for nullity of marriage on the ground of his wife's wilful refusal to consummate. Despite the husband's continuous protests during ten years of married life, the wife insisted on his use of a contraceptive on every occasion of intercourse. The Court of Appeal considered itself bound by *Cowen* v. *Cowen,* 114 L. J. P. 57, to hold that the marriage had never been consummated, but held also that the husband had acquiesced in the wife's condition. As was noted in *The Conveyancer,* Vol. 11, p. 293, the reasoning was strained in order to avoid some of the embarrassment which *Cowen* v. *Cowen* had occasioned. The House of Lords has now upheld the decision of the Court of Appeal, but on almost converse reasoning. Overruling *Cowen* v. *Cowen,* the House held that the marriage had been consummated, though the husband had never acquiesced in the manner of consummation. On the authority of the classic definition of marriage in *Hyde* v. *Hyde* (1866), L. R. 1 P. & D. 130, the House reasoned that the procreation of children was neither a necessary nor the principal end of marriage, just as marriage was not a necessary prerequisite to the procreation of children. A no less realistic reason adduced by the Lord Chancellor was the sociological one of the common practice of birth control at the time of the passing of the Matrimonial Causes Act, 1937. Lord Jowitt, L.C., remarked: "I take the view that in this legislation Parliament used the word 'consummate' as that word is understood in common parlance and in the light of social conditions known to exist, and that the proper occasion for considering the subjects raised by this appeal is when the sexual life of the spouses, and the responsibility of either or both for a childless home, form the background to some other claim for relief" (at p. 892). This principle was recently applied in *Rice* v. *Raynold-Spring-Rice,* [1948] 1 All E. R. 188, in which a Divisional Court of the Divorce Division upheld the decision of justices who, on a wife's summonses for desertion and wilful neglect to maintain, had taken into account in dismissing her complaints the evidence of the husband that the wife, refusing to bear a child, denied to him complete intercourse with her. Lord Merriman, P., citing the foregoing extract from the Lord Chancellor's judgment in the *Baxter Case,* observed (at p. 190), "Every word of that sentence applies precisely to the case which we are considering". The result is that, while the insistence of one party on the use of contraceptives by the other will not prevent the consummation of a marriage for purposes of annulment on the ground of wilful refusal to consummate, such an attitude may be very relevant in determining whether, for example, one spouse is justified in leaving the other.

In the second of these nullity cases, *Horton* v. *Horton,* the husband again was appealing against the Court of Appeal's upholding of the dismissal of his petition for nullity on the ground of his wife's wilful refusal to consummate the marriage. The marriage was celebrated in 1944, but by agreement between husband and wife reached some months after the marriage, no consummation took place, though an unsuccessful attempt was made at the end of 1945. A year later, when the husband suggested further attempts at intercourse, the wife informed him that any such idea was obnoxious to her. It was argued that, whatever may have been the earlier history of the marriage, in its later stages the wife alone was responsible for its non-consummation. Lord Jowitt, L.C., delivering a judgment in which all other members of the House of Lords concurred, observed, "... it does not follow because the wife was not willing to consummate the marriage in January, 1946, that she was guilty of a wilful refusal within the meaning of the section" (at p. 874). The Lord Chancellor considered it undesirable to try to define "wilful refusal"; but went some way towards a definition in giving to those words the connotation of "a settled and definite decision

come to without just excuse". In determining whether there has been such a refusal, the Judge "should have regard to the whole history of the marriage" (p. 874). The House accordingly held that the wife had not wilfully refused consummation, and declined to express any opinion on whether the husband's earlier refusal to consummate would prevent him from petitioning against his wife at a later date on the same ground after he had changed his mind. *Dicta* of Lord Greene in the Court of Appeal's decision in this case had indicated that the husband would be estopped in such circumstances from presenting a petition.

(Latey, p. 174)

Nullity of marriage—pregnancy at time of marriage by some person other than the husband—Matrimonial Causes Act, 1937, *s.* 7 (1) (*d*) *and proviso* (*iii*)—*Smith* v. *Smith,* [1947] 2 All E. R. 741.—The Court of Appeal has followed the common law tradition in applying the objective test of reasonableness rather than the subjective one of actual personal belief to the question of the effect of evidence of a wife's pre-marital pregnancy on her husband's relations with her after becoming aware of such evidence.

In this case a child was born seven months after the marriage of the parties. The husband, despite reliable information that the child was not prematurely born, resumed cohabitation with his wife, refusing to believe that he was not the father. A month after the child was born the wife admitted to her husband that he was not the father, and nullity proceedings were commenced. The decision turned on the effect of proviso (iii) to the Matrimonial Causes Act, 1937, s. 7, which runs, "that marital intercourse with the consent of the petitioner has not taken place since the discovery by the petitioner of the existence of the grounds for a decree". In affirming the decision to dismiss the husband's petition, the Court expressed, in the words of Bucknill, L.J. (at p. 743), the test of belief to be applied: "While thinking that such belief must play its part in considering whether the husband had discovered the existence of the grounds for a decree, I do not myself think it is a condition precedent for the operation of the proviso. . . . In my view the learned Judge was right in his finding that the facts laid before the husband would have made abundantly clear to any reasonable man that the child was not his. I think that that is the proper test when interpreting this proviso". Tucker, L.J., went further in holding that the husband's belief was immaterial.

(Latey, pp. 178, 180)

Divorce—evidence of non-access—the rule in Russell v. *Russell,* [1924] 93 L. J. P. 97—*condonation—Goss* v. *Goss,* [1947] 2 All E. R. 617.—The effect of this decision of a Divisional Court is to confirm a practice long followed, though doubted by Willmer, J., in *Morris* v. *Morris,* [1947] 2 All E. R. 377, of allowing a husband to give evidence of non-access to rebut an allegation of condonation, cruelty or communicating venereal disease, whether or not the effect of such evidence is incidentally to bastardise the issue of the marriage. Under the rule in *Russell* v. *Russell* such evidence would not, of course, be admissible on the direct issue of adultery. But the judgment of Lord Merriman, P., in the present case covers the situation in which the husband seeks to rebut the wife's evidence that he had intercourse with her on a date coinciding with the conception of a child, and by so doing condoned the wife's adultery which led to

conception. Although the husband's evidence would be inadmissible to prove the adultery, it may be admitted to rebut condonation, even though both results are deductions from evidence of the same event.

(Latey, pp. 124 ff.)

Summary jurisdiction—maintenance orders—the "one-third of joint incomes" rule—Ward v. *Ward,* [1947] 2 All E. R. 713.—This decision of a Divisional Court is chiefly notable for its emphatic deprecation of the traditional standard of awarding to a wife one-third of the total income of herself and her husband. Such a standard as applied to wealthy litigants at a time when, in the words of Lord Merriman, P., " . . . income tax was 1s. in the pound " is inappropriate in respect of working-class people to-day when, as in the present case, husband and wife were both in employment. Although justices must have regard to the means of the parties, the Summary Jurisdiction (Married Women) Act, 1895, s. 5 (*c*), does not exclude other facts from consideration. Within the statutory limit of £2 a week, justices should make an order which is reasonable in all the circumstances of the individual case.

Summary jurisdiction—desertion—husband domiciled and ordinarily resident in Scotland—extent of Summary Jurisdiction (Married Women) Act, 1895, *s.* 4—*Forsyth* v. *Forsyth,* [1947] 2 All E. R. 623.—The decision of the Divisional Court noted in *The Conveyancer,* Vol. 11, p. 294, has now been reversed by the Court of Appeal. Following the principle laid down by Lord Selborne, L.C., in *Berkley* v. *Thompson* (1884), 54 L. J. M. C. 57, Bucknill, L.J., held that the general terms of section 4 of the Summary Jurisdiction Act, 1895, did not extend to Scotland, and that the Scottish case of *M'Queen* v. *M'Queen,* [1920] 2 S. L. T. 405, was rightly decided. Tucker, L.J., dealt with the question of voluntary submission to the jurisdiction through the appearance of a solicitor instructed by the husband, and held that the general authorities on the question had no application to English Courts of inferior and statutory jurisdiction. " If such an inferior Court lacks jurisdiction ", remarked Tucker, L.J., " parties cannot by agreement or otherwise confer jurisdiction on it."

Possession of matrimonial home—Married Women's Property Act, 1882, *s.* 17—*Hutchinson* v. *Hutchinson,* [1947] 2 All E. R. 792; *Stewart* v. *Stewart,* [1947] 2 All E. R. 813.—The decisive factor in the application of s. 17 of the Married Women's Property Act, 1882, which these two decisions illustrate, is that of judicial discretion. In *Hutchinson's Case,* the wife who had obtained a decree of judicial separation against her husband, had continued to live with her son in a house purchased by the husband, which had been the matrimonial home. The occupation value of the house had been taken into account in the award of alimony payable by the husband. Denning, J., allowed the wife's appeal against the order of a Master for delivery up to her husband of the house, basing his decision on the ground that the wife had behaved quite properly, that had there been no order for judicial separation the husband could not have turned her out and that the existence of a decree of judicial separation made no difference.

With this decision may be contrasted *Stewart* v. *Stewart,* in which a wife appealed from a decision of a County Court Judge under s. 17 of the

Act of 1882 awarding possession of the matrimonial home to the husband, who was tenant of the premises. Although the Court of Appeal did not decide how far the order of the County Court extended in the event of the wife's disobedience, it was assumed that the wife could be forcibly ejected. The Court dismissed the wife's appeal, in its reluctance to interfere with the exercise of judicial discretion in the Court below. A material factor was the institution by the husband of proceedings for divorce on the ground of his wife's adultery, Tucker, L.J., observing, " The rights of one spouse with regard to the matrimonial home as against the other may vary with the circumstances of each case, and, although it is, no doubt, the duty of the husband to provide somewhere for the wife to live until a decree is made absolute, it does not necessarily follow (in fact, in many cases it would be very inconvenient and embarrassing) that she should be sharing rooms under the same roof as her husband " (p. 814). In *Hutchinson's Case,* Denning, J., adverted to the necessity for the judicial exercise of the Court's discretion in the matter. Yet the principle on which discretion is exercised judicially is obscure, when possession is refused to the owner of a house already judicially separated from his wife and granted to a tenant who has merely instituted proceedings for divorce, which may or may not succeed.

Marriage by proxy—Apt v. *Apt,* [1947] 2 All E. R. 677.—A fuller report is now available of the decision of the Court of Appeal in this case than that noted at p. 147 above. It is only necessary to add to that note the opinion of the Court of Appeal that the method of giving consent to marriage, as distinct from the fact of consent, is essentially a matter for the *lex loci celebrationis* and does not raise a question of essential validity of marriage. Secondly, though the general tenour of the Court of Appeal's judgment was wider than that of Lord Merriman, P., an important limit was placed on this generality in the *dictum* of the Court that, " If a case occurs where the proxy is revoked before the ceremony takes place, but the other spouse and the proxy are unaware of the revocation, it may be that the Courts of this country would hold that the purported marriage was void, but that would be not because of any general objection to proxy marriages, but because on the facts of the particular case the Court was satisfied that the marriage was not a voluntary union " (at p. 680).

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5. *DEATH DUTY CASES*

By L. J. STEIN, Barrister-at-Law

Estate duty—valuation of shares in company controlled by deceased—Finance Act, 1940, *s.* 55.—Section 55 of the Finance Act, 1940, deals with the valuation, for estate duty purposes, of shares in or debentures of a company passing on the death of a person by whom the company was controlled. The shares or debentures are to be valued by reference to the net value of the company's assets, and the effect of sub-section (2) of section 55, above, read together with section 50 (1) of the same Act, is that the net value of the assets is to be taken as the price which they would fetch if sold in the open market at the time of the death of the deceased, less an allowance for liabilities, including contingent liabilities. The question which arose in *Re Duffy,* [1947] Taxation Reports 393, concerned the application of these provisions in relation to the company's

liability for income tax. The deceased died on June 24, 1942. The company's accounting year ended on January 31. Two steps were required in the computation called for by section 55, above—first, the ascertainment of the net value of the assets at June 24, 1942, and, secondly, the ascertainment of the amount deductible in respect of liabilities. As to the first step, it was common ground that the figure could properly be arrived at by taking the net value of the assets at the close of the last complete accounting year before the death, *viz.*, the year ended January 31, 1942, and, in respect of the broken period from February 1, 1942, to June 24, 1942, adding a rateable part, computed on a time basis, of the profits for the accounting year ended January 31, 1943. It was conceded by the Estate Duty Office that the deductible liabilities included the income tax payable for the year of assessment 1942–43 on profits measured by those of the accounting year ended January 31, 1942. It was, however, contended by the executors that there ought also to be deducted a rateable part, computed on a time basis for the period from February 1, 1942, to June 24, 1942, of the income tax payable for the year of assessment 1943–44 on profits measured by those of the accounting year ended January 31, 1943. In support of this contention it was argued that the earning of profits in that accounting year must lead to an assessment to income tax, based on those profits, for the year of assessment 1943–44, and that the tax which would thus become payable must, accordingly, be deductible as a contingent liability in arising at the net value of the assets at June 24, 1942. Roxburgh, J., did not accept this reasoning. He pointed out that, whereas on June 24, 1942, it was certain that income tax would be payable for 1942–43, there was at that date no such certainty that it would also be payable for 1943–44. If the company chose to cease trading in 1942–43, it would not be assessable to income tax for 1943–44, and, however unlikely it might be that it would, in fact, cease to trade, tax for 1943–44 could not properly be said to have been a liability—even a contingent liability—of the company at June 24, 1942. At that date the company was free, if it chose, to close down, and " if you can go out of business and thereby escape for any liability to tax, then . . . you are not under a liability for the tax in question ".

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6. *LANDLORD AND TENANT CASES*

By Lionel A. Blundell, LL.M., Barrister-at-Law, and
John T. Plume, Barrister-at-Law

Holding-over at a weekly rent—whether implication of a yearly or a weekly tenancy.—Although the payment of a weekly rent by one who holds over after the expiration of his term of years does not of itself give rise to an implication of a yearly tenancy, because a weekly rent is not a fractional instalment of a yearly rent (*Ladies' Hosiery and Underwear* v. *Parker,* [1930] 1 Ch. 305); the fact that the tenant holding over pays a weekly rent does not preclude the Court from finding that he is in all the circumstances a tenant from year to year: *Covered Markets* v. *Green,* [1947] 2 All E. R. 140. In that case the tenant of a shop had a seven years' lease and then was allowed to stay on for several years more; McNaghten, J., refused to infer from the fact that the rent was payable weekly that he was merely a weekly tenant, and drew the inference that the tenant held over as tenant from year to year after the expiration of his seven years' term.

(Woodfall, 2nd ed., pp. 272, 277.)

Rebuilding of house after demolition due to enemy bombing—rights of pre-bombing tenant in the re-built house.—Two recent decisions have done much to clarify the position (after a number of conflicting county court judgments) as to the rights of the pre-bombing tenant in a house rebuilt under a cost-of-works payment from the War Damage Commission. These are *Ellis & Sons Amalgamated Properties* v. *Sisman* (1947), 64 T. L. R. 11 (Court of Appeal), and *Simper* v. *Coombs,* [1948] W. N. 74 (Denning J.).

In the former case a weekly tenant of the house availed himself of the right which he had under section 1 of the Landlord and Tenant (War Damage) (Amendment) Act 1941, his being a " short tenancy " under that Act, to withhold payment of rent after his house became so severely damaged by an enemy bomb that it could no longer be occupied. No step was taken at that stage by either party as regards bringing his weekly tenancy to an end. The house was later demolished and everything except the foundations removed by the local authority. By June, 1947 a house similar to the one destroyed was in course of erection and although well on the way to completion was not yet finished. While it was in this state and not yet habitable the landlords determined the weekly tenancy by a valid notice to quit. The tenant claimed a right to occupy the house as a statutory tenant when the house was completed.

The Court of Appeal held that he had no such right. The question whether the house in course of erection was a different house from the old one or merely the old house in course of repair was one of law, not of fact, and on the facts proved in this case the Court of Appeal held that the house in course of erection was in law not the same house as the one that had been bombed. Since on the day the notice to quit expired the house was only partly erected and not yet habitable, the tenant was not on that day the tenant of a dwelling-house let as a separate dwelling within the definition contained in section 16 (1) of the Rent, etc., Act of 1933; accordingly he was not in a position to claim a statutory tenancy under section 15 (1) of the 1920 Act and so had no rights in respect of the new house. The Court held that there was nothing in section 1 of the 1941 Act to interfere with the landlord's right to serve a notice to quit determining the tenancy without applying to the Court.

In *Simper* v. *Coombs* the parties came before the Court in somewhat similar circumstances but with the material difference that no notice to quit had ever been served and the tenant was still a contractual tenant at the time the rebuilt house was completed. Denning, J., accordingly held that his tenancy of the land, and, therefore, of the new house erected on it, continued. The tenant was accordingly entitled to possession of the new house.

This decision is clearly consistent with that in the *Ellis Case,* the material question being whether there is subsisting a contractual tenancy in the premises when the house is completed.

(Rent Restrictions Guide, 2nd ed., p. 65.)

Rent Restrictions Acts—Construction of section 3 (2) (*b*) *of the Act of* 1939 *and section* 10 (1) *of the Act of* 1923—*Principles governing questions whether a dwelling-house is bona fide let at a rent which includes payments in respect of the use of furniture and whether the amount of rent which is fairly attributable to the attendance or use of furniture forms a substantial portion of the whole rent.*—In the two appeals in *Palser* v. *Grinling* and *Property Holding Company* v. *Mischeff,* heard together by the House of Lords and reported in 64 T. L. R. at p. 2, the House has pronounced its opinion upon a number of important issues arising in connection with

furnished lettings and lettings with attendance. The points decided are as follows:—

(1) The words *bona fide* in section 3 (2) (b) of the 1939 Act govern all the following words and mean that the rent must genuinely include payments in respect of board, attendance or use of furniture. The Act is not to be evaded by a merely colourable use of words which do not correspond to what is really provided (see *Nye* v. *Davis*, [1922] 2 K. B. 56, *per* Shearman, J., at p. 59).

(2) "Attendance" means service personal to the tenant performed by an attendant provided by the landlord in accordance with his covenant for the benefit or convenience of the individual tenant in his use or enjoyment of the demised premises. Attendance which is dispensed with by an individual tenant because he does not want it is not on that account excluded from what the tenant pays rent for when the landlord has covenanted to supply it. But services such as a communal hot water supply or cleaning passages, etc., outside the demised premises do not constitute attendance. The provision of a housemaid or valet to discharge duties in connection with the flat would be attendance, but not the provision of a resident porter or housekeeper for a block of flats. The House of Lords approved the interpretation of "attendance" given by Lord Greene, M.R., in *Engvall* v. *Ideal Flats*, [1945] 1 All E. R. 230, at p. 233.

(3) "Furniture" has a statutory meaning which cannot be extended by the particular agreement. The expression designates articles which are commonly and currently regarded as furniture in which the landlord has a proprietary right as against the tenant, excluding articles which at the beginning of the demise constituted part of the dwelling-house itself. The modern fitted bath, a cellar lid kept in position by its own weight, and a corner seat fixed solidly into a corner and forming in fact part of the building are examples of what is not "furniture". Furniture is usually but not necessarily movable. Articles otherwise entitled to rank as furniture should, if affixed to the fabric, be regarded as part thereof if they cannot be detached without appreciable damage to or alteration of the fabric or themselves; otherwise they should be regarded as furniture. The expression "use of furniture" indicates that the furniture must be provided for the use or enjoyment of the dwelling in question; articles provided for places outside the demise, such as halls and passages used in common with other tenants, are excluded.

It will be noted that the test of what is furniture does not accord quite with either the majority or the minority view expressed by the Court of Appeal in *Gray* v. *Fidler*, [1943] K. B. 694.

(4) "The amount of rent which is fairly attributable to attendance or the use of furniture, regard being had to the value of the same to the tenant" refers to the total amount of rent attributable to both when both are provided. The tenant referred to is the actual tenant whose lease is under examination. The value to him has to be taken into account, but the words "regard shall be had" indicate that a broad judgment should be exercised and other factors duly weighed and allowed for. Any arithmetical calculation must be qualified by what is fair and reasonable. Those words appear to be introduced in order to exclude or discount articles included in the let which are left on the premises by the landlord either for his own convenience (*e.g.*, as a convenient mode of storage) or in quantities which, having regard to the size of the dwelling and the tenant's need for furniture, are greater than the tenant wants. In assessing the amount of rent which is "fairly" attributable to the use of the furniture, commonsense considerations have to be applied. The chief factor is that if and so far as the landlord does not provide furniture which the tenant would normally require to use, the tenant would have

to provide it himself. *It is the value to the tenant of the landlord's covenant to provide furniture which mainly controls the figure to be arrived at, and not the cost to the landlord, though the latter in many cases may also be a relevant factor.* If the landlord provides the furniture then (in the absence of express covenant) the burden of wear and tear, which the tenant otherwise would suffer, falls on him; on the other hand (again in the absence of express covenant) he does not undertake to repair it or renew it when it becomes worn out. Its expectation of life must be considered. "What the judge of fact has to do is to take the furniture as it is and to fix a fair rental for it, having regard to its value to the tenant, remembering that old furniture wears out sooner than new and that the landlord (apart from special covenant) does not undertake to repair or renew it."

(5) A "substantial portion" of the whole rent means a portion which is considerable, solid or big in relation to the entire contractual rent payable by the tenant in return for the occupation of the premises together with all the other covenants of the landlord. "Substantial" does *not* mean not unsubstantial, *i.e.*, just enough to avoid the *de minimis* principle. Applying the word in this sense, it must be left to the discretion of the judge of fact to decide the question according to the circumstances of each case, the onus being on the landlord. Percentages cannot be fixed as a legal measure, for that would be going beyond the powers of the justiciary. Thus the percentages suggested by the Court of Appeal in *Palser* v. *Grinling* (see the Note of the case in *The Conveyancer,* Vol. 11, p. 61) have no general application.

(6) The "whole" rent means the entire rent payable by the tenant, and where the landlord covenants to pay the rates no deduction is to be made on account of that. This is in conformity with the Court of Appeal decision in *Somershield* v. *Robin,* [1946] 1 K. B. 244, on the parallel question which arises in relation to county court jurisdiction.

The principles laid down by the House of Lords in these two cases settle many questions which had been the subject of divided opinions and are of outstanding importance.

(Rent Restrictions Guide, 2nd ed., pp. 72–74.)

Tenancy or licence—jurisdiction under Small Tenements Recovery Act, 1838—In *Ramsbottom* v. *Snelson* (1948), 64 T. L. R. 55, an order for possession made by a magistrates' Court under section 1 of the Small Tenements Recovery Act, 1838, was set aside on the ground that the defendant was not a tenant but a bare licensee. The sole point in the appeal was to determine whether the defendant had been turned out by the right Court.

The occupier was a farm stockman who was given the cottage rent and rates free and was required to live there for the purpose of his employment. The Divisional Court held that this was a requirement not merely because the landlord fancied he would like the stockman to live in his cottage, but arising out of the nature of his duties as stockman: a stockman must be available at all times of the day and night to attend to calving cows, or to animals which have injured themselves or to perform other similar duties. The case was therefore analogous to the cases where a chauffeur is required to live over his garage, or a gamekeeper in a cottage on the estate. Lord Goddard, L.C.J., was careful to make it clear that the Court was not saying that the justices have no jurisdiction under the 1838 Act in the ordinary case of farm labourers occupying tied cottages;

this was made a special case by reason of the nature of the duties rendered by the particular labourer.

(Woodfall, 24th ed., p. 12.)

Option to purchase freehold—unlimited in point of time—whether infringing rule against perpetuities—action for specific performance.—A case in which a tenant sought to enforce an option, unlimited in point of time, to purchase was decided by Jenkins, J., in the case of *Hutton* v. *Watling* (1947), 63 T. L. R. 615. In the year 1937 the plaintiff entered into a written agreement with the defendant which provided (*inter alia*) that he should purchase forthwith the goodwill of a business and that he should enter into occupation of the business premises as a weekly tenant. The agreement further provided that "In the event of the purchaser wishing at any future date to purchase the property in which the business is situated, she has the option of purchase at a price not exceeding £450". The purchaser of the goodwill carried on the business from the premises, which she occupied as tenant under the agreement, until the year 1944, when she wrote a letter seeking to enforce the option to purchase. The defendant declined to convey and the plaintiff brought an action for specific performance. The defendant first attempted to adduce oral evidence which would have had the effect of contradicting the written agreement. The learned Judge declined to allow him to do this. Next he contended that the option was an independent stipulation, not part of the agreement for the sale of the goodwill, and was consequently unenforceable for want of consideration. It was held that the option was part and parcel of the whole agreement for which there was consideration. Lastly it was contended that the option was void as infringing the rule against perpetuities. It was held that the option was enforceable, the action being between the original parties to the agreement. The learned Judge relied upon and followed the judgments of the Court of Appeal in the case of *South Eastern Ry.* v. *Associated Portland Cement Manufacturers* (1900), *Ltd.*, [1910] 1 Ch. 12. In that case the Court held that a covenant might be bad against the rule against perpetuities as being a limitation of land but at the same time be enforceable between the original parties as a personal contract. Farwell, L.J., at p. 33, expressed the law thus: "As regards the original covenantor it may be both; he may have attempted both to limit the estate, which may be bad for perpetuity, and he may have entered into a personal covenant which is binding on him because the rule against perpetuities has no application to such a covenant". In the present case, Jenkins, J., said that the above case provided clear authority to the effect that an "option to purchase land without limit with regard to time is specifically enforceable as a matter of personal contract against the original grantor of the option, and that the rule against perpetuities has no relevance in such a case, as distinct from a case in which such an option is sought to be enforced against some successor in title of the original grantor, not by virtue of any contractual obligation on the part of the successor in title, but by virtue of the equitable interest in the land conferred on the grantee by the option agreement".

Jenkins, J., distinguished the decisions in *Woodall* v. *Clifton*, [1905] 2 Ch. 257, and *Worthing Corporation* v. *Heather*, [1906] 2 Ch. 532, as being cases in which the option was sought to be enforced against the assigns or successors in title of the original grantor. He also declined to follow the decision of Russell, J., in *Rider* v. *Ford*, [1923] 1 Ch. 541, on the ground that, although it was an action between the original parties

to a covenant, the learned Judge's attention had not been drawn to *South Eastern Ry.* v. *Associated Portland Cement Manufacturers* and further that it was admitted (but wrongly) in that case that the option was invalid except in certain contingencies.

The learned Judge's attention was drawn to passages in *Williams on Vendor and Purchaser* (4th ed., vol. 1, p. 424, note (*i*)) and in *Gray on Perpetuities* (4th ed., pp. 366 and 367) where doubts are expressed as to the correctness of the exposition of the law in *South Eastern Ry.* v. *Associated Portland Cement Manufacturers.* He thought that those doubts were unfounded.

(Woodfall, 24th ed., p. 1004.)

Rent Restrictions Acts—meaning of word " rent "—additional payment in respect of services, etc.—whether to be regarded as " rent " for purpose of fixing standard rent—Rent and Mortgage Interest (Restrictions) Act, 1920, *s.* 2 (3), *s.* 12 (1) (*a*)—*transfer of burden.*—The recent case of *Property Holding Co.* v. *Clark,* [1948] 1 All E. R. 165, is of considerable importance in that it lays down the principles upon which the standard rent of dwelling-houses under the Rent Acts should be determined in cases where a separate sum has been charged for services, etc., under the contract which fixes the standard rent. Two sums of money were payable under the lease which fixed the standard rent. Under the reddendum the tenant was to pay the sum, referred to as " the rent ", of £110 per annum; there followed a number of tenant's covenants and then the lease proceeded: " And the landlords hereby agree that provided and so long as the tenant shall pay the rent and the additional payment for services hereafter provided and shall perform the covenants on his part herein contained they will: (i) Pay all rates ", etc. There was a further agreement in the lease that the landlord would provide certain fittings, amenities and services for which the tenant covenanted to pay the sum of £7 10s. quarterly on each rent day. Then there followed a proviso for re-entry " if the said rent or additional payment . . . shall be unpaid ", etc. The question which the Court had to decide was whether the standard rent was the sum of £110 or whether it was that sum plus the £7 10s. quarterly, *i.e.,* £140. On behalf of the tenant it was argued that the payments for services were not " rent " at common law and also that unless the parties expressly called them so they could not be " rent " within the meaning of section 12 (1) (a) of the 1920 Act as amended by the Act of 1939. The Court of Appeal was unanimous in deciding that the sum recoverable for services was " rent " within the meaning of the Acts in the particular circumstances of the case. However, it must not be taken that in all cases where separate sums are recoverable for services a like conclusion would be reached. The guiding principles to be applied in each case might be summarised in the following way: (a) One must look at the substance and not necessarily the form of the payment; (b) the fact that the parties have not chosen to call the payment " rent " is not conclusive one way or the other; (c) is the landlord's covenant for quiet enjoyment conditional on the payment of the particular sum ?; (d) does the non-payment of the particular sum give rise to the landlord's right of re-entry ? The law was stated in this way by Scott, L.J.: " The conclusion at which I arrive is that the word " rent " in all the statutory provisions about standard rent carries a meaning sufficiently wide to cover each quarterly payment of £7 10s. under the clause, whether some of the benefits to the tenants, to which the payment is attributable, have been already, expressly or impliedly, included in the main grant or are only added by that clause.

On that issue of interpretation the landlord's right of re-entry is, to my mind, the conclusive factor. I reject the contention that a covenant to pay cannot be a covenant to pay rent unless the payment is called 'rent' in the lease or agreement. It is the substance that matters. . . ." Evershed, L.J., in the course of his judgment said: "In my judgment the question in each case is to determine what in substance is the subject-matter of the tenancy granted to the tenant by the contract. *Prima facie* the rent is the monetary compensation payable by the tenant in consideration for the grant, however it be described or allocated. Alternatively, it may be described (as Scott, L.J., has described it) as the contractual monetary obligation the payment of which is the condition of the right to enjoy the property granted. . . . The subject-matter here granted was the exclusive right to possession of a particular flat, partly furnished, and the right to enjoy certain other amenities in connection with the flat. The landlord's covenant for quiet enjoyment was conditional upon payment both of the rent (so described) and of the additional payment of £30 a year, and non-payment of any part of either was expressed to give rise equally to the landlord's power of re-entry." It must be stressed that one should look to the substance of the agreement in every case. Of course, there may be cases where the payment would at first sight be brought within the above tests although it could not be part of the "rent" for the purpose of determining the standard rent, *e.g.*, where the payment is in respect of something outside and apart from the "dwelling-house" demised. Evershed, L.J., gave as such a case a letting which included a payment for the privilege of garaging the tenant's car in the landlord's garage, no part of which was included in the thing demised.

The Court went on to consider the question of the transfer of burdens under section 2 (3) of the 1920 Act and the case of *Winchester Court, Ltd.* v. *Miller,* [1944] 2 All E. R. 109. Neither the authorities nor the Acts themselves give any guidance as to how the transferred burden is to be assessed in terms of money. A problem which is becoming of increasing importance in view of the general rise in prices is whether the value of the burden is to be considered at the date of the original letting, the date of its transfer, or the date when the question is considered by the Court. Although this aspect of the matter does not appear to have been argued there are passages in the judgments which lend support to the contention that the value is that at the date of the original letting.

(Rent Restrictions Guide, 2nd ed., pp. 32, 40.)

Repairing covenants—whether tenant liable to remedy inherent defects in demised premises—damage resulting from inherent defects.—The decision of Lynskey, J., in the case of *Sotheby* v. *Grundy,* [1947] 2 All E. R. 761, is one of practical importance in relation to the construction of repairing covenants. A ninety-nine years' lease of a newly constructed house was granted in 1861. It contained a covenant by the lessee to "repair uphold support maintain . . . with all necessary reparations and amendments whatsoever". The house was built in violation of the Metropolitan Building Act, 1855, either entirely without, or with defective footings. The walls began to bulge about the year 1929 and eventually in 1944 they were bulged and fractured and overhung to such an extent that a dangerous structure notice under the London Building Acts was served on the lessor who was compelled to demolish the building. The lessor sought to recover damages from the lessee for breach of the repairing covenant. It was proved that the state of dilapidation in 1944 was a direct result of the inadequacy or lack of foundations when the house was

built. The learned Judge dismissed the lessor's claim and held that the damage was caused by the inherent nature of the defect in the premises, and, therefore, did not come within the terms of the repairing covenant. Evidence was given that the only way in which the premises could have been saved was by their being underpinned in about the year 1929 when the bulging of the walls was first noticed. To do this it would have been necessary to shore up the premises, remove such foundations as existed, and replace with an entirely new foundation. In the course of his judgment Lynskey, J., said: "That in my view, would, in effect, be asking the tenant to give the landlord something different in kind from that which had been demised. The premises demised here were premises with insecure foundations. What the tenant would have to do would be to put in a new foundation which would alter the nature and extent of the property demised, turning a building which, as originally constructed, would not last for more than some eighty odd years into a building that would last for probably another hundred years." The learned Judge followed *Lister* v. *Lane,* [1893] 2 Q. B. 212, and in particular the words of Lord Esher, M.R., at p. 216, "if a tenant takes a house which is of such a kind that by its own inherent nature it will in course of time fall into a particular condition, the effects of that result are not within the tenant's covenant to repair". He then referred to *Anstruther-Gough-Calthorpe* v. *McOscar,* [1924] 1 K. B. 716, and said: "It may be that the inherent nature of the building may result in its partial collapse. One can visualise the floor of a building collapsing, owing to defective joists having been put in. I do not think *Lister* v. *Lane* would be applicable to such a case. In those circumstances, in my opinion, the damage would fall within the ambit of the covenant to repair, but, as I say, it must be a question of degree in each particular case."

(Woodfall, 24th ed., pp. 692 *et seq.*)

Law of Property Act, 1925, *s.* 146—*breach of covenant against subletting—relief from forfeiture.*—The question whether the Court has power to grant relief against a forfeiture incurred by subletting without consent was answered in the affirmative by Lord Goddard, C.J., in *House Property and Investment Co., Ltd.* v. *James Walker, Goldsmith and Silversmith, Ltd.,* [1947] 2 All E. R. 789. In that case the lease contained a covenant against assigning or subletting without consent. The covenant, of course, had to be read in conjunction with section 19 of the Landlord and Tenant Act, 1927, which implies a condition in the case of such a covenant that the consent shall not be unreasonably withheld. The premises, the subject of the lease, comprised a shop which was temporarily being used as a store. The Ministry of Works approached the tenant and negotiated for a sub-lease. The tenant was reluctant to grant such a lease but eventually gave way under the threat of requisitioning. The sub-lease was for two years. Fifteen months later the landlord heard of what had been done and served a notice under section 146 of the Law of Property Act, 1925, and then commenced proceedings for forfeiture. Before the case was heard the sub-lease had expired but the Ministry retained the right to possession, having requisitioned the premises. There was no doubt that the tenant had incurred a forfeiture; the tenant was under an obligation to ask the landlord for his consent to the subletting and it was no excuse for the tenant to say that such consent could not reasonably have been withheld. The tenant must in all cases ask for consent (*vide* Woodfall, 24th ed., p. 581). The Lord Chief Justice rejected the contention, based on *Barrow* v. *Isaacs & Son,* [1891] 1 Q. B. 417, and *Eastern Telegraph*

Co. v. *Dent*, [1899] 1 Q. B. 835, that the Court had no power to grant relief in such cases. Section 146 (2) of the Law of Property Act, 1925, empowered the Court to grant relief in the case of any breach of covenant, and applied equally, said the learned Judge, to covenants against assignment and underletting without consent as it did to any other breach. The matter was put beyond any doubt by section 146 (8) which provides: "This section does not extend (i) to a covenant or condition against assigning, underletting, parting with possession, or disposing of the land leased where the breach occurred before the commencement of the Act". The two cases referred to above were cases under the law prior to 1925 and now cease to have any practical application.

The Court then considered whether relief should be granted in the particular circumstances of the case. The learned judge came to the conclusion that the lessee did the sensible thing in sub-letting in order to try and avoid a requisitioning and felt that there was small blame attaching to it in not asking for consent. As the sub-lease had expired and as the premises had been requisitioned relief was granted without any conditions being imposed.

While this case lays down some general principles it must be borne in mind that each particular case must be judged on its merits. It must not be thought that this case opens the way for tenants to sub-let without asking for consent with impunity. Here the sub-letting had terminated by the date of the hearing but very different considerations might apply in cases where the sub-letting was still continuing at the date of the trial and where it was not in the tenant's power to bring it to an end. In the present case the Court did not have to consider the well-established principle that relief will not normally be granted unless the tenant undertakes to remedy the breach (*vide* Woodfall, 24th ed. p. 942).

(Woodfall, 24th ed., pp. 934 *et seq.*)

Landlord and Tenant Act, 1927 *ss.* 4 *and* 5—*Compensation for goodwill or claim for new lease—front and back portions of business premises held under different leases—expiration of lease of back part—whether goodwill attaching to whole apportionable—no goodwill attaching to back part by itself.—Morell & Sons, Ltd.* v. *Canter* (1947), 63 T. L. R. 556; was a case in which the tenant of business premises claimed a new lease, or alternatively compensation, under the provisions of sections 4 and 5 of the Landlord and Tenant Act, 1927. The tenant held shop premises fronting a public thoroughfare under one lease and a warehouse at the back under another lease. Both sets of premises were used together by the tenant for business purposes. The back premises were used as a showroom and storeroom in conjunction with the shop at the front. Customers always entered through the shop in the front and never obtained access to the back premises direct. It was held by the referee, to whom the case was referred, and also by the county court Judge that substantial goodwill attached to the premises as a whole but that no goodwill attached to the back premises once they became severed from the shop in the front. It was argued before the Court of Appeal by counsel for the tenant that if there are two sets of premises held for the purpose of one business and a goodwill attaches to the business, there must in law be an apportionment between the two. The Court rejected this argument and held that sections 4 and 5 of the Act are clearly limited to the premises contained in the lease or other tenancy agreement referred to in those sections. To put it in another way the test in each case as to whether goodwill attaches under section 4 is whether the premises contained in the particular lease,

if let independantly of any other premises, would fetch a higher rental, by reason of the goodwill. It must be remembered that a tenant can only avail himself of the provisions as to compensation in section 4 if he can show that the reversion of the landlord has been increased in value by reason of the goodwill, etc. In the present case the tenant could do little more than show that, if the landlord were to acquire the shop premises in front, then if he let them with the back premises, the latter might have some goodwill attached to them.

(Woodfall, 24th ed., p. 1068.)

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Snell's Principles of Equity. Twenty-third edition. By R. E. MEGARRY, M.A., LL.B. London: Sweet & Maxwell, Ltd. 1947. cxxiv and 606 pp. (37s. 6d. net.)

The appearance of a new edition of *Snell's Equity* has been long awaited in view of the extensive body of case law which has accumulated since 1939. "Snell" has become a household word with the legal profession and has proved an indispensable source of information, not only to generations of law students but also, it is believed, to a large section of practitioners. It is one of the few examples of a textbook, outside the range of such specialised works as *Lewin on Trusts*, which has not gradually deteriorated by passing through the hands of numerous successive editors, and it is indeed fortunate that it has fallen to Mr. R. E. Megarry to continue the task which since 1915 had been so adequately discharged by Mr. H. G. Rivington. The new editor, of whose erudition in the field of Equity his learned notes and articles in the *Law Quarterly Review* have given ample evidence, is to be unhesitatingly congratulated for a most competent achievement. He has not shrunk from introducing many changes in the arrangement of chapters by new sub-divisions and contraction of analogous matter. A great many sections have been entirely re-written, such as the law of secret trusts and the rule in *Howe* v. *Dartmouth*, which previously had not attained the standard of detail and lucidity which the importance of these subjects undoubtedly demands. In this connection we notice a strong disapproval of Lord Wright's *dictum* in *Re Keen* as to the admissibility of parol evidence to establish a "half-secret" trust communicated and accepted after the will but before the testator's death. The learned editor ventures to suggest that there is some doubt as to the present state of the law, "resting on somewhat unsatisfactory *dicta*, due perhaps to a flirtation with the rules governing incorporation of documents in wills" (p. 78). The terse comment on *Re Fisher*, [1943] Ch. 377, conveys the impression that the rules of apportionment invariably apply in the case of intestacy (pp. 169, 171). Without qualification, this is not conceived to represent an accurate interpretation of the decision which was based on evidence that the administrators had failed to exercise their discretion under section 33, A. E. A., to postpone conversion (see *per* Bennett, J., at p. 385. Cf. *Rowlls* v. *Bebb*, [1900] 2 Ch. 107). In any event this matter calls for further elucidation in the future in view of the unsatisfactory manner in which Bennett, J., attempted to escape the effect of *Re Sullivan*, [1930] 1 Ch. 84. It is also felt that the explanation of *Slade* v. *Chaine* (at p. 171) has been compressed within too narrow a compass to be really intelligible to the uninitiated. In addition to contributing a certain number of entirely new sections, such as an exposition of Protective and Discretionary Trusts, the editor has introduced a feature new to this book of furnishing references to articles in legal periodicals. This is particularly welcome in a book of Snell's scope, where considerations of space frequently prevent a more detailed discussion of controversial or intricate issues. To lighten the labour of students, citations of cases in the footnotes are now followed by references to Nathan's *Equity through the Cases* and *White & Tudor's Leading Cases*, though it should be emphasised that case books are no satisfactory substitute for the law reports, particularly in the field of Equity, where first-hand study of decisions amply repays the endeavour devoted to it.

The incorporation of new cases decided since the last edition has been carried out with accustomed thoroughness, and no omissions have been noticed. It may perhaps be of assistance to suggest a future mention of *Re Randall*, 38 Ch. D. 213, and *Re Blunt's Trusts*, [1904] 2 Ch. 767, on the effect of the Perpetuity Rule on gifts over to residuary legatees after a prior determinable gift to charity. We also miss a criticism of *Re Carrington* (p. 207), and an adequate indication of the implications of *Re Macartney* (election). The last sentence of section 1 of the chapter on Performance (p. 225) states that volunteers under an incompletely constituted trust are "without any remedy" only "if the debt created by the covenant is statute-barred". This should be amended in view of *Re Pryce* and *Re Kay's Settlement*, which are, however, accurately noted at p. 92. The unqualified reference to *Re Bowen*, [1893] 2 Ch. 491 (at p. 116), is misleading as the principle stated in the text was only referred to in the judgment at p. 494. Would it not be more profitable to state the actual *ratio decidendi*?

Mr. Megarry also intimates his intention of introducing more radical changes in the next edition by omitting portions of certain chapters which are either obsolescent or receive more adequate treatment in specialised works, such as the law of restrictive covenants. As an expression of personal opinion the reviewer would prefer a retention of the chapters on Mistake and Vendor and Purchaser (Specific Performance); the former, because it represents a convenient harbour for the several lines of authority which would otherwise roam unshepherded in the law of contract, quasi-contract, and the various branches of Equity, and the second because we know of no concise treatise of Conveyancing which has hitherto dealt with the subject more satisfactorily.

J. G. F.

Lincoln's Inn: Its History and Traditions. By Sir William Ball, O.B.E., King's Remembrancer. London: Stevens & Sons, Ltd. 1947. 285 pp. (12s. 6d.)

This is a wholly delightful book, most of it about people and about lawyers in particular. It is full of good stories and the fact that this reviewer read it all through in one day in bed in some pain is, we think, sufficient evidence that all can read it with pleasure. It does of course tell us something of the Inn and its history —indeed many interesting things about both—but its humanity and urbanity provide its greatest charm. It would not be fair to repeat the amusing ancedotes here collected together—we can only say "read for yourselves".

Law of Support in Relation to Minerals. By F. A. Enever, M.C., M.A., LL.D., of Gray's Inn, Barrister-at-Law; Principal Assistant Solicitor, Treasury Solicitor's Department. London: The Solicitors' Law Stationery Society. 1947. xiv and 162 pp. (25s.)

Dr. Enever was until recently Legal Adviser to the Coal Commission and, therefore, speaks with a special experience of this problem which will not grow less with the nationalisation of mines, so long as the surface may be privately owned. Of course this topic is not confined to coal, as incidentally appears from this book where, for instance, *Hext* v. *Gill*, L.R. 7 Ch. 761 is cited to show that china clay could not be gotten under the reservation because it involved destroying the surface. Nevertheless, most of the authorities do in fact turn on coal and in this book Dr. Enever has arranged these as clearly as he can. In fact the special feature of this book is the classification under a series of subheadings. It begins with the Common Law from which the learned author has retracted certain "guiding principles" which he sets out with supporting authority and citations from judgments. Furthermore he normally gives the relevant facts of the case where he cites from it, thus enabling the reader to follow the effect of the citation. He then turns to the statute law and takes each statute in turn. The book ends with conclusions which are the learned author's views on desirable reform. More than lawyers will be interested in this last and this book is valuable to all concerned with the subject.

Hanson's Death Duties. Ninth edition. Second Cumulative Supplement. By JACKSON WOLFE, LL.D., and HENRY E. SMITH, LL.B. Sweet & Maxwell, Ltd., 7s. 6d. net.

With commendable promptitude the latest edition of *Hanson's Death Duties* has been brought up to date by a Supplement incorporating all relevant material up to December, 1947. The editors have done their work with their usual efficiency and have fully maintained their established reputation as reliable guides through one of the most perplexing of legal mazes. The new matter dealt with in the Supplement includes, not only the death duties provisions of the 1946 and 1947 Finance Acts, but also the Crown Proceedings Act, 1947, and the double taxation Agreements with Canada and South Africa. Among the more important of the recent decisions duly noted and commented upon may be mentioned those in *Treasurer of Ontario* v. *Aberdeen* (locality of shares), *Re Cassel's Will Trusts* (joint and survivorship annuities), *Re Jones, Soames* v. *Att.-Gen.* (an interesting contrast to the decision in *Re Turner's Will Trusts* on the effect, in relation to estate duty, of Section 31 of the Trustee Act, 1925), and *Re Miller's Agreement, Uniacke* v. *Att.-Gen.*, which throws light on the estate duty position under Section 2 (1) (d) of the Finance Act, 1894, on the death of B where A had covenanted with B to pay an annuity, commencing on B's death, to C. Considering that the ninth edition appeared as recently as 1946, the length of the Table of Cases, of which those mentioned are merely appetising samples, testifies to the complexity of the problems presented by the death duties legislation and handled by the editors of *Hanson* with a skill which entitles them to the sincere gratitude of the harassed practitioner.

Theobald on Wills (10th edition). By J. H. C. MORRIS, B.C.L., M.A., of Gray's Inn, Barrister-at-Law; Fellow of Magdalen College, Oxford. London: Stevens & Sons, Sweet & Maxwell. 1947. lxxiv and 639 pp. (£2 15s.)

Theobald on Wills is so well known to conveyancing practitioners that its general merits call for no comment here. Certain changes have been made. Sidenotes have been incorporated in the text and references to cases put in footnotes. Personally we like these changes. The learned editor (an authority on this subject) has re-written Chapter 1 on the Conflict of Laws. As might be expected it is a chapter which scintillates, but somehow its texture is so different from the rest of the book that we wonder whether it is the right treatment. There are quite a number of rewritten or new sections and, of course, the book has been brought up to date throughout. We have used it repeatedly and put to this test, which we think the most practical, we think it responds admirably. A practitioner should be put in the way of finding the answer even if the answer is not in the text. Perhaps we may be guilty of the heresy of saying that on the whole we like Mr. Morris better than we like the late Sir Henry Theobald.

The learned editor opines that he has only noted two or three cases out of 300 in which the testator might have been surprised at the interpretation placed upon his will. In his opinion this contradicts a view that he describes as "fashionable in some quarters" that rules of construction are obstacles rather than aids to discovering the testator's intention. It is a comforting thought that the cases where the testator's intentions are defeated do not reach the courts or perhaps are not often reported. When it is considered how many originating summonses every term deal with the construction of wills we can see that most of them turn on particular words but anyway practitioners will be grateful for this new and very up-to-date edition of Theobald to help them in their struggle to interpret the "home-made" will.